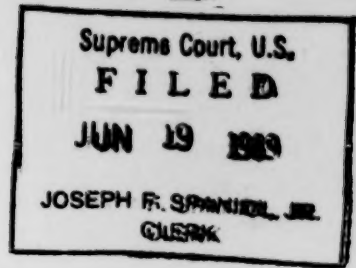


89-180

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Supreme Court of The United States
October Term, 1988

City of Garfield Heights
Petitioner

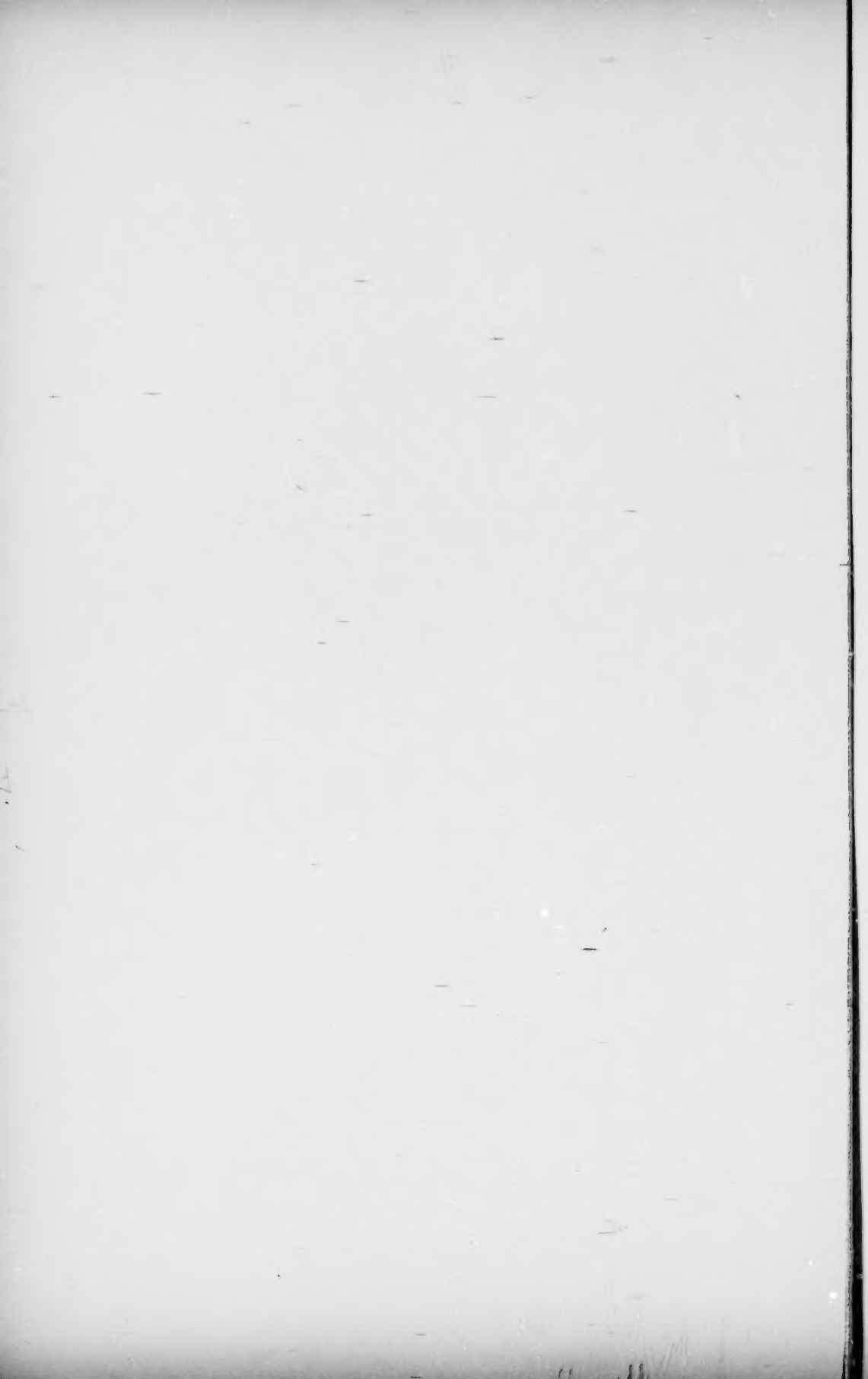
v.

William Asad
Respondent

Petition For Writ of Certiorari
From The Supreme Court of Ohio

David E. Mack
Wilhelm G. Spiegelberg
City of Garfield Heights
5555 Turney Road
Garfield Heights, Ohio 44125
(216) 475-1100
Attorneys for Petitioner

59



Questions Presented

I.

Did the Supreme Court of the State of Ohio violate Petitioner's Fourteenth Amendment due process rights in denying review of the Eighth District Court of Appeals decision which determined Respondent could prevail over Petitioner on the basis that Petitioner failed to give Respondent proper notice of its appeal of an Ohio Civil Rights Commission Ruling?

II.

Did the Supreme Court of the State of Ohio violate Petitioner's Fourteenth Amendment due process rights as affirmed in the Ohio Constitution by requesting that Petitioner be hired for the next available fire fighting position in the face of a medical history which would not be acceptable under normal circumstances?

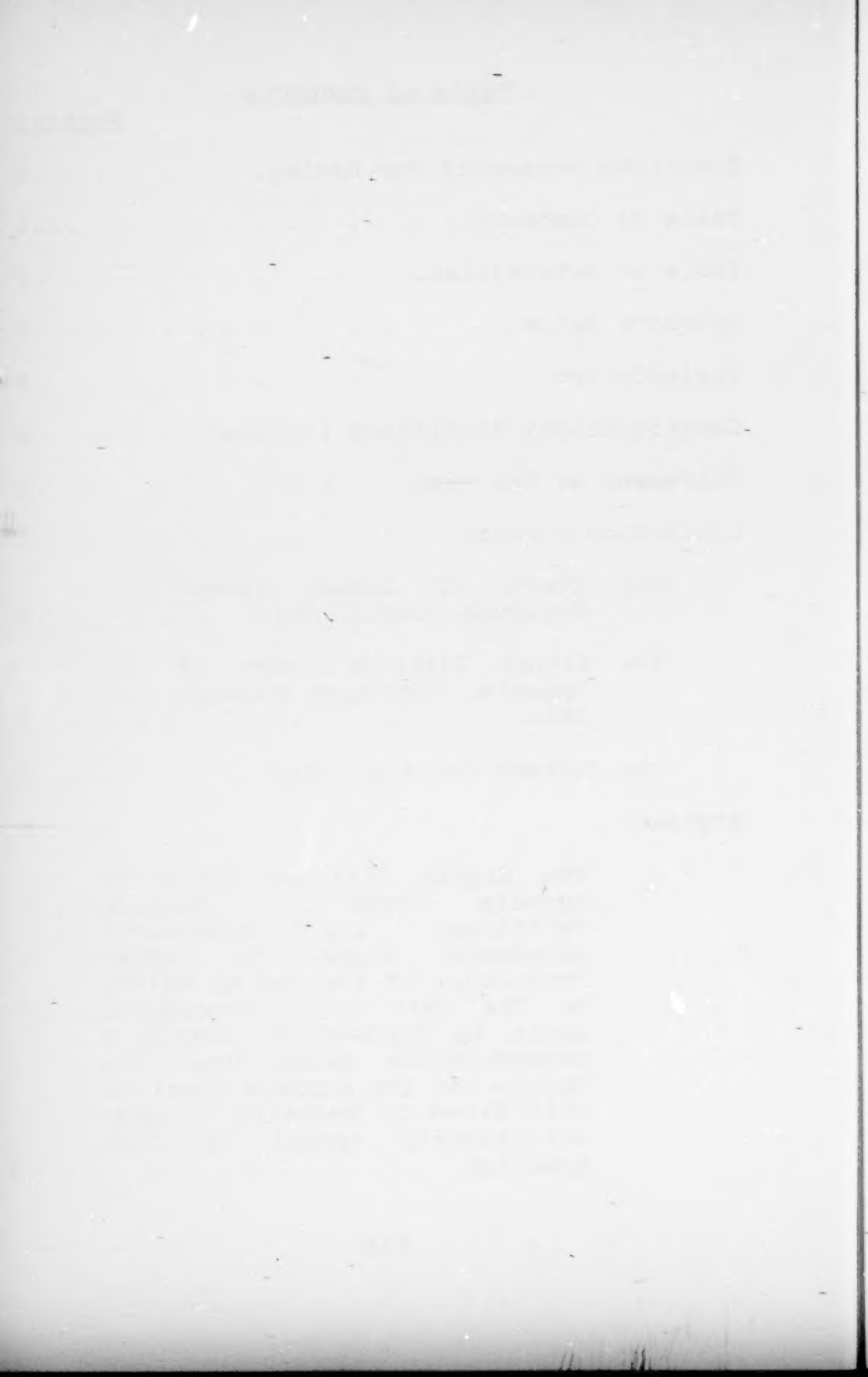
Parties To The Proceedings Below

In each of the Courts below, Plaintiff was the City of Garfield Heights and Defendant was William Asad.



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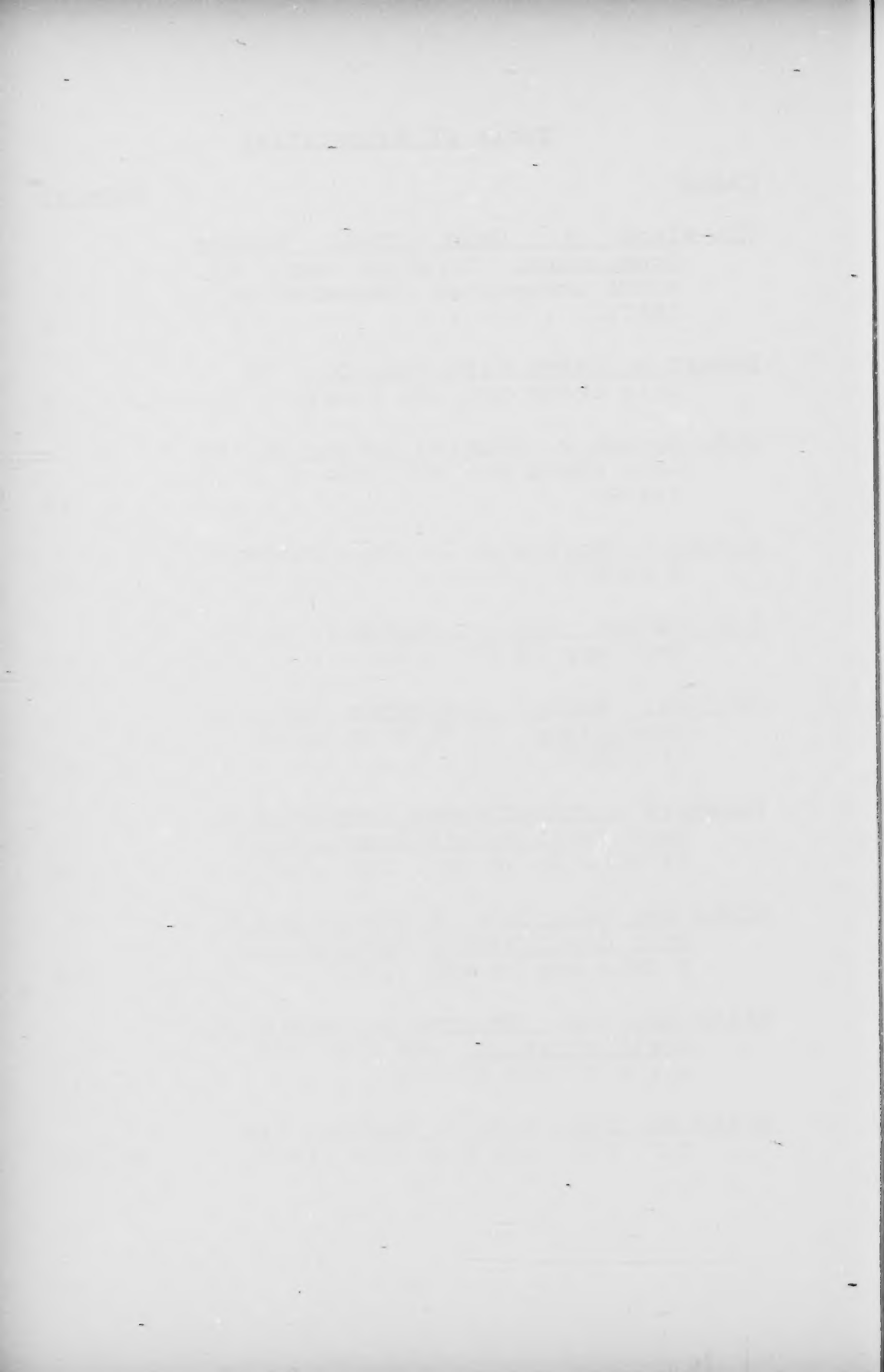


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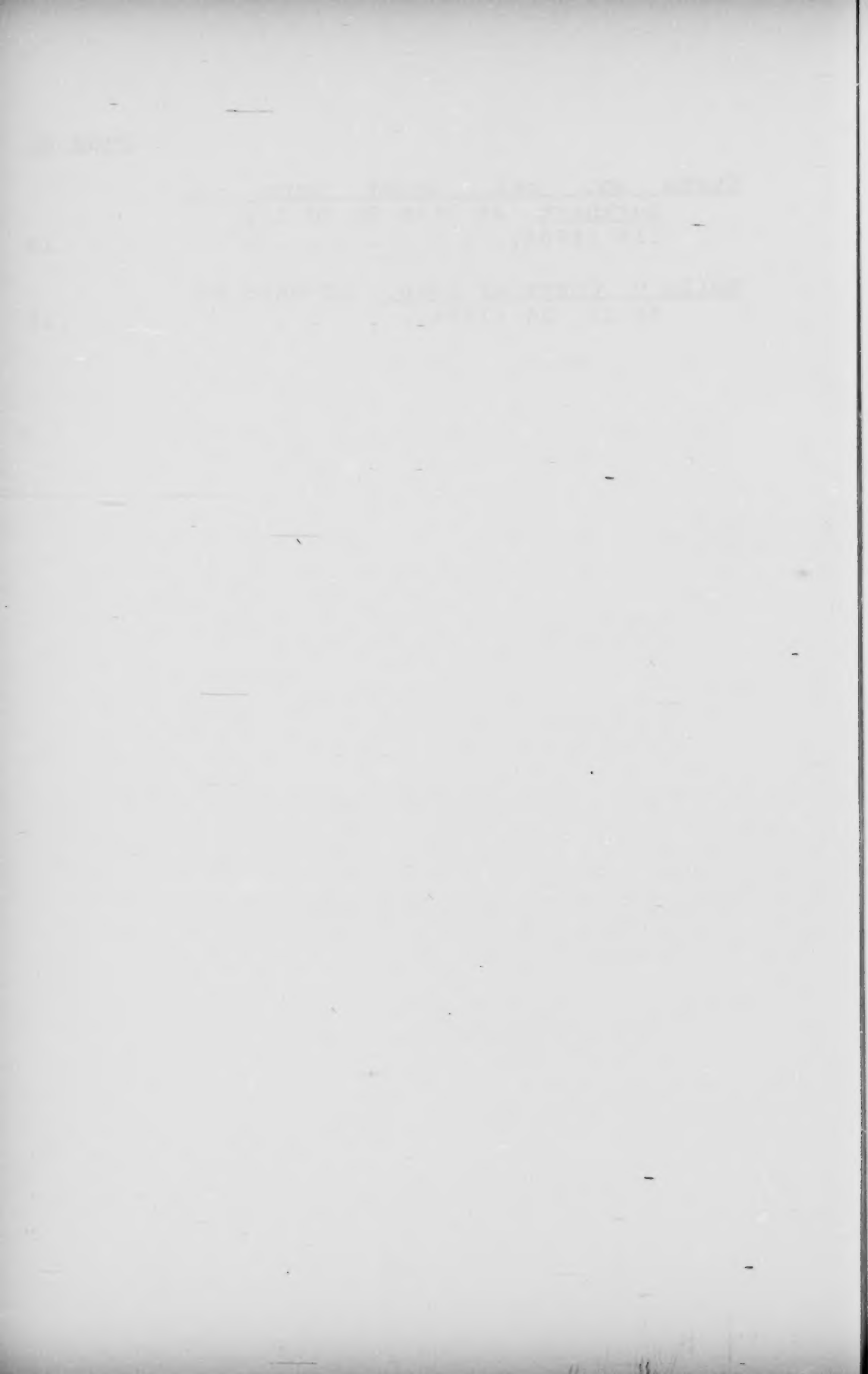
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Opinions Below

The Findings of Fact, Conclusions of Law and Order of the Ohio Civil Rights Commission dated November 14, 1985 is reprinted as Appendix A to this petition at A-1.

The Judgment Entry of the Cuyahoga Court of Common Pleas dated September 17, 1987 is reprinted as Appendix B to this petition at B-1.

The Decision of the Eighth District (Ohio) Court of Appeals dated November 10, 1988 is reprinted as Appendix C to this petition at C-1.

The Original Order of The Supreme Court of Ohio dated February 15, 1989 is reprinted as Appendix D to this petition at D-1.

The Denial of Rehearing by the Supreme Court of Ohio dated March 22, 1989 is reprinted as Appendix E to this petition at E-1.

Jurisdiction

The Denial of Rehearing by the Supreme Court of Ohio was entered on March 22, 1989. This petition for certiorari is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254(i).

Constitutional Provisions Involved

Fourteenth Amendment, Section 1, United States Constitution:

"Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement Of The Case

William R. Asad submitted an application for a position as a fire fighter to the City of Garfield Heights on February 19, 1982. Mr. Asad scored high enough on his Civil Service

Introduction

The Board of Directors of the company
has the honor to acknowledge the receipt of
your letter of the 15th inst. in relation to
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the same and is of the opinion that it is
advisable to grant the extension.

The Board has also considered the
proposed extension of the term of the
lease of the land, and is of the opinion
that it is advisable to grant the extension.

The Board has also considered the
proposed extension of the term of the
lease of the land, and is of the opinion
that it is advisable to grant the extension.

The Board has also considered the
proposed extension of the term of the
lease of the land, and is of the opinion
that it is advisable to grant the extension.

Test to qualify for an interview for certain available positions.

Mr. Asad also took two (2) physical examinations which he neither passed nor failed. He was not certified by the doctor to do "heavy" work.

He was then interviewed by the then Mayor, Safety Director and Fire Chief of Garfield Heights, who then, upon review, determined that Mr. Asad was not the best candidate available. This determination was based primarily on Mr. Asad's medical record, particularly the fact that Mr. Asad was the only candidate at the time not to be certified for "heavy" work.

Litigation History

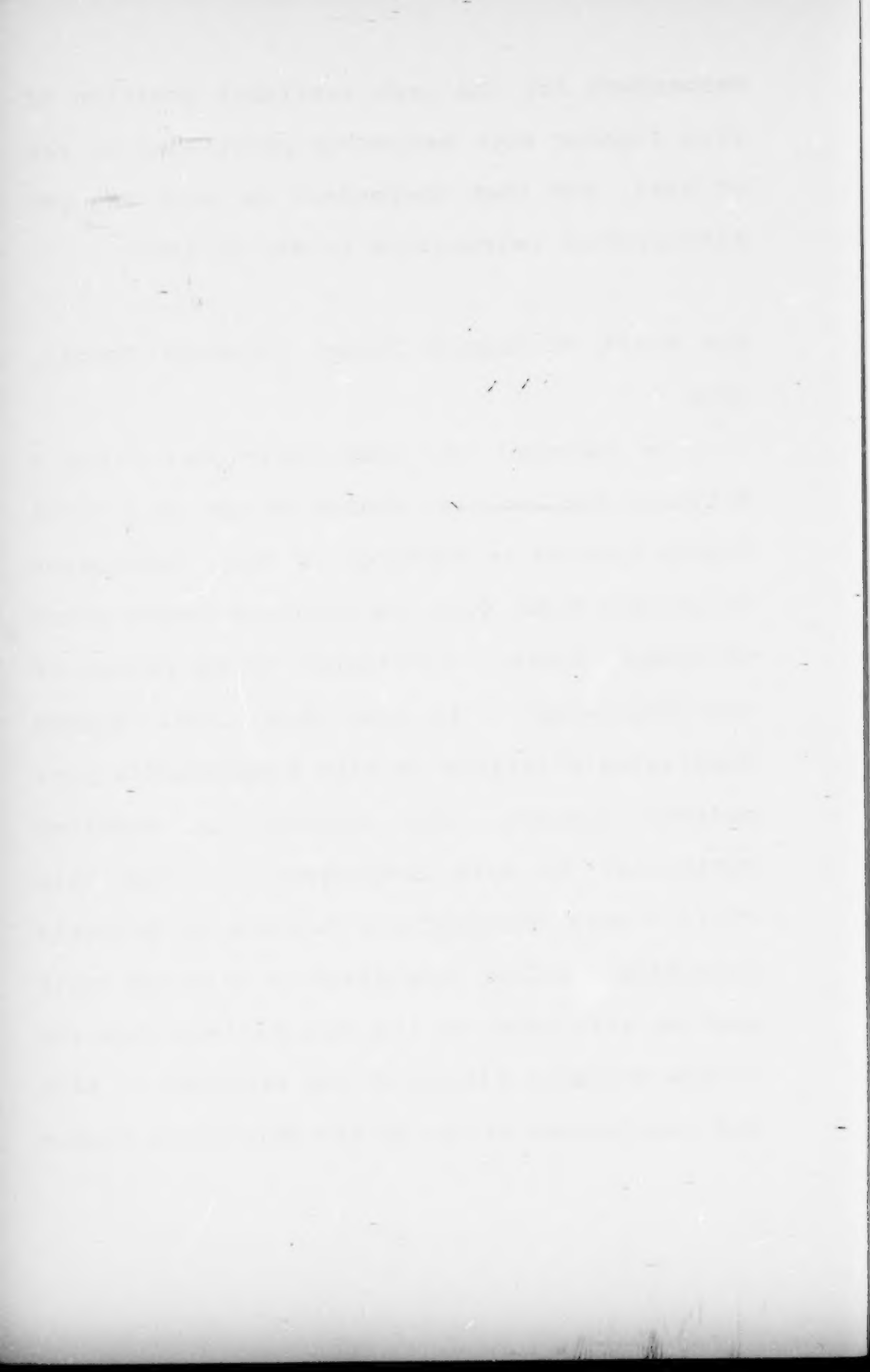
Mr. Asad filed a complaint with the Civil Rights Commission of the State of Ohio on May 24, 1983, claiming Garfield Heights refused to hire him as retaliation for his filing an unlawful discrimination suit against the City

of Brooklyn (another suburb of Cleveland) prior to his application for employment with Garfield Heights. Garfield Heights filed a timely answer and hearings were held on September 25 and October 26, 1984. The Commission filed briefs on December 31, 1984 and February 13, 1985 and Garfield Heights filed its brief on February 13, 1985. The Commission issued its Findings of Fact, Conclusions of Law and Order on November 14, 1985. While the Commission found Petitioner had a legitimate nondiscriminatory reason for not hiring Respondent, namely his medical history, it also found that Petitioner did discriminate against Respondent in not hiring him based upon his prior lawsuits against the City of Brooklyn. This practice was deemed to be a violation of Ohio Revised Code Section 4112.05(G). The Commission ordered that Petitioner not violate Ohio Revised Code Section 4112 entitled "Civil Rights Commission", that Petitioner hire

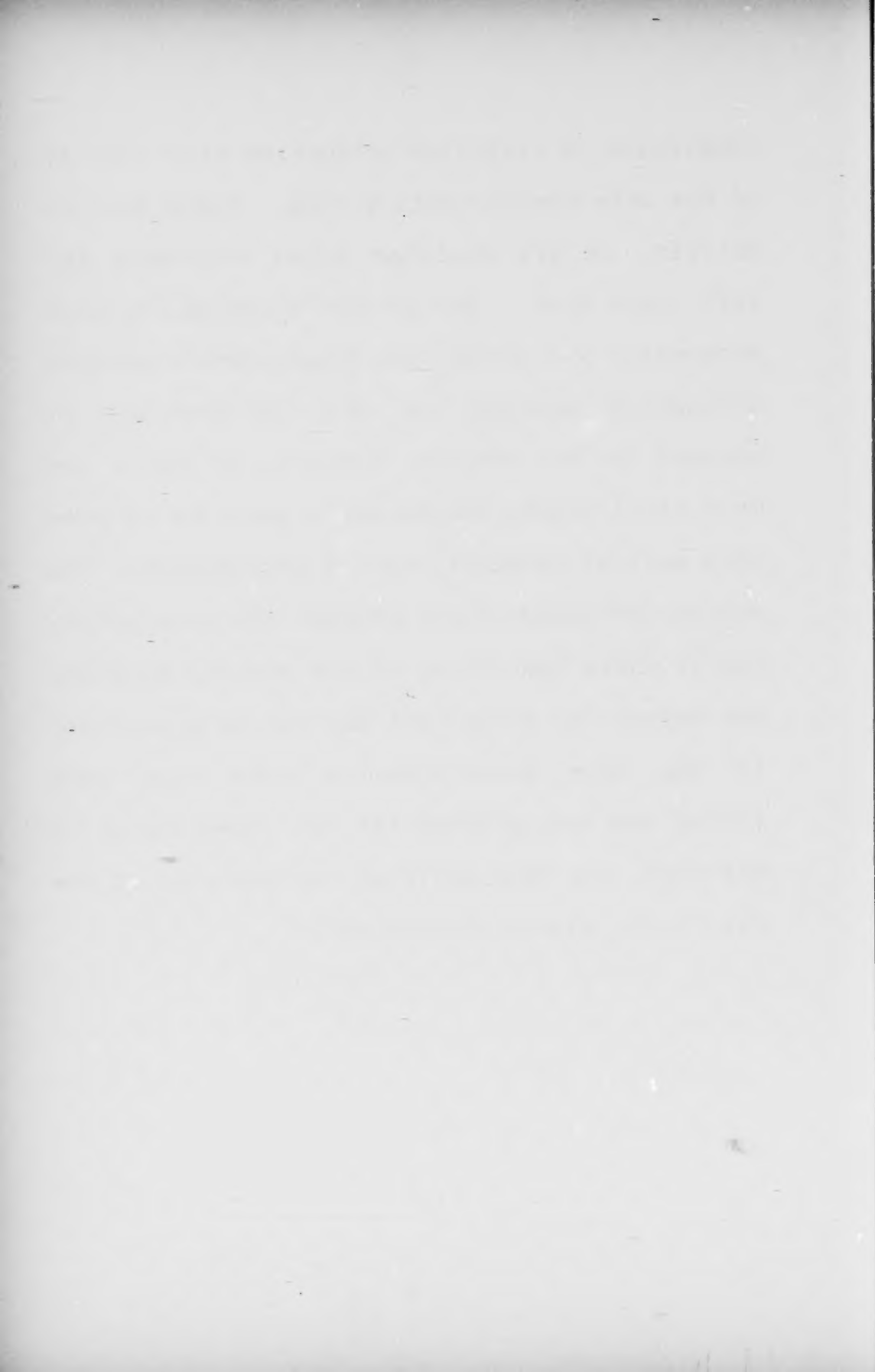
Respondent for the next available position of fire fighter with seniority privileges to May of 1983, and that Respondent be paid any pay differential retroactive to May of 1983.

The Court of Common Pleas, Cuyahoga County,
Ohio

On December 24, 1985 Petitioner filed a Petition For Judicial Review of the Ohio Civil Rights Commission Findings of Fact, Conclusion of Law and Order with the Cuyahoga County Court of Common Pleas. Petitioner asked review of the following: 1) the Ohio Civil Rights Commission's failure to take Respondent's poor medical history into account in ordering Petitioner to hire Respondent, 2) the Ohio Civil Rights Commission's failure to properly investigate and/or conciliate as required under Section 4112.05(B) of the Ohio Revised Code and 3) the untimely filing of the Findings of Fact and Conclusions of Law by the Ohio Civil Rights



Commission in violation of Section 4112-3-09(A) of the Ohio Administrative Code. Judge Burt W. Griffin, in his decision dated September 16, 1987, held that 1) Petitioner's refusal to hire Respondent was based upon Respondent's pending litigation against the City of Brooklyn as opposed to his medical history, 2) while the Ohio Civil Rights Commission's position on pre-hire medical examinations was inconsistent, its mediation/conciliation attempt was acceptable, and 3) while the filing of the hearing examiner was beyond the sixty (60) day period prescribed in the Ohio Administrative Code said late filing was not prejudicial to either party in the case, and thus affirmed the decision of the Ohio Civil Rights Commission.



The Eighth District Court of Appeals, Cuyahoga County, Ohio

On April 20, 1988, Petitioner filed an appeal of the Common Pleas Court decision with the Eighth District Court of Appeals. Petitioner raised the same three issues raised in the Court of Common Pleas. The Court of Appeals dismissed the first two assignments of error on the basis that the service of its complaint in Common Pleas Court by the City of Garfield Heights was improper in that according to the Court of Appeals service need be made through the Clerk of Courts. This is the primary issue in question within this Petitioner for Writ of Certiorari. While the Court of Appeals chastised the Ohio Civil Rights Commission's tardiness on the filing of its examiner's findings it did not find prejudicial fault and thus Petitioner's appeal was dismissed. Said dismissal was announced November 10, 1988.

The Right Honorable Lord of the Council
County of

On this 10th day of

18

In the County of

State of

That

Do hereby certify

That

That

That

That

That

The Supreme Court of Ohio.

Petitioner filed a Memorandum In Support Of Claimed Jurisdiction with the Supreme Court of Ohio on January 6, 1989. Respondent filed a Memorandum Opposing Jurisdiction shortly thereafter. On March 22, 1989 the Court denied Petitioner's right to a rehearing.

Argument

I.

The Eighth District Court Of Appeals Erred In Denying Petitioner Its Fourteenth Amendment Right To Equal Protection Of The Law By Ruling On The Case On A Procedural Basis As Opposed To Making A Determination Based Upon The Merits And The Supreme Court of Ohio Erred In Refusing To Hear Petitioner's Appeal On That Question.

Petitioner City of Garfield Heights filed its petition arising out of the Ohio Civil Rights Commission's findings with the Common Pleas Clerk of Courts and sent all other parties copies by regular United States mail. The Court of Appeals held that, under Ohio

The following is a list of the names of the persons who have been named in the report of the committee on the subject of the proposed amendment to the constitution of the State of New York.

1. Mr. John A. B. Smith, of the City of New York.
2. Mr. John A. B. Smith, of the City of New York.
3. Mr. John A. B. Smith, of the City of New York.
4. Mr. John A. B. Smith, of the City of New York.
5. Mr. John A. B. Smith, of the City of New York.
6. Mr. John A. B. Smith, of the City of New York.
7. Mr. John A. B. Smith, of the City of New York.
8. Mr. John A. B. Smith, of the City of New York.
9. Mr. John A. B. Smith, of the City of New York.
10. Mr. John A. B. Smith, of the City of New York.

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6. Mr. John A. B. Smith, of the City of New York.
7. Mr. John A. B. Smith, of the City of New York.
8. Mr. John A. B. Smith, of the City of New York.
9. Mr. John A. B. Smith, of the City of New York.
10. Mr. John A. B. Smith, of the City of New York.

Revised Code Section 4112.06(B), other parties in administrative appeals must be served by summons through the Clerk of Courts. The Eighth District Court of Appeals cited its own earlier decision in Cleveland v. Ohio Civil Rights Commission, (December 24, 1987), Cuyahoga App. No. 53095, unreported. This was its only authority. Petitioner contends that the Court of Appeals incorrectly applied Ohio law in these earlier decisions. Ohio Revised Code Section 4112.06(B) states in pertinent part:

- (B) Such proceedings shall be initiated by the filing of a petition in court as provided in division (A) of this section and the service of a copy of the said petition upon the Commission and upon all parties who appeared before the Commission.

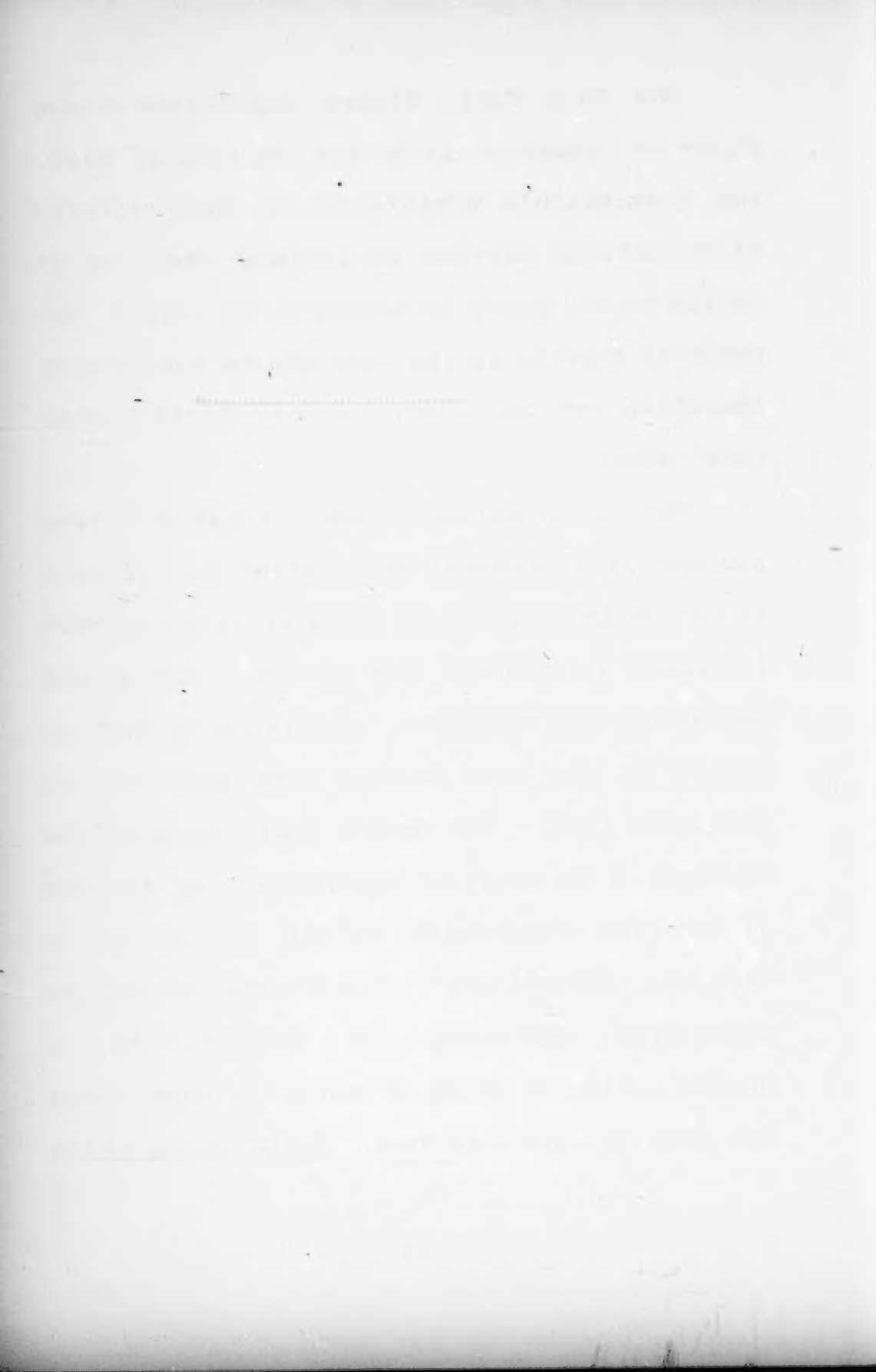
Petitioner followed 4112.06(B) in filing a petition in the Court and by making service upon all parties who appeared before the Commission. Respondent has never claimed that he was prejudiced by the fact that Petitioner

used regular United States mail service to serve him with a copy of its petition to the Court of Common Pleas. In an administrative appeal there are no true requirements for a defendant to "appear and defend". The 28-day answer requirement arising out of a summons issued by the Clerk would be false and misleading. Moreover, failure to "appear and defend" in an administrative appeal cannot result in the rendering of a default judgment. J.C. Sanson, Inc. v. Rodgers (1986), 30 Ohio App. 3d 77 (Cuyahoga Cty. App.).

The Ohio Supreme Court had previously stated that in an administrative appeal procedure where no particular method of delivery is prescribed by the statute that any method productive of certainty of accomplishment is countenanced. Dudu Kovich v. Housing Authority (1979), 58 Ohio St. 2nd 202, 204.

The Ohio Civil Rights Commission's own rules of procedure allow for service by mail. The Commission's Administrative Rule 4112-1-01(M) defines service to include "service of notice to any party in person or by mail." The Court of Appeals ruling contradicts the rule of operation set forth by the Ohio Civil Rights Commission.

The Ohio Revised Code § 124.42 lists passage of a physical examination as criteria to be met in order to be hired as fire fighters in order to protect the health, safety and welfare of the community. Specifically Section 124.42 of the Ohio Revised Code provides in pertinent part: "No person shall be eligible to receive an original appointment as fireman in a fire department unless he passed a physical examination." The discretion of the appointing authority is limited to a determination of which of three (3) applicants are most fit and qualified. State ex rel. King

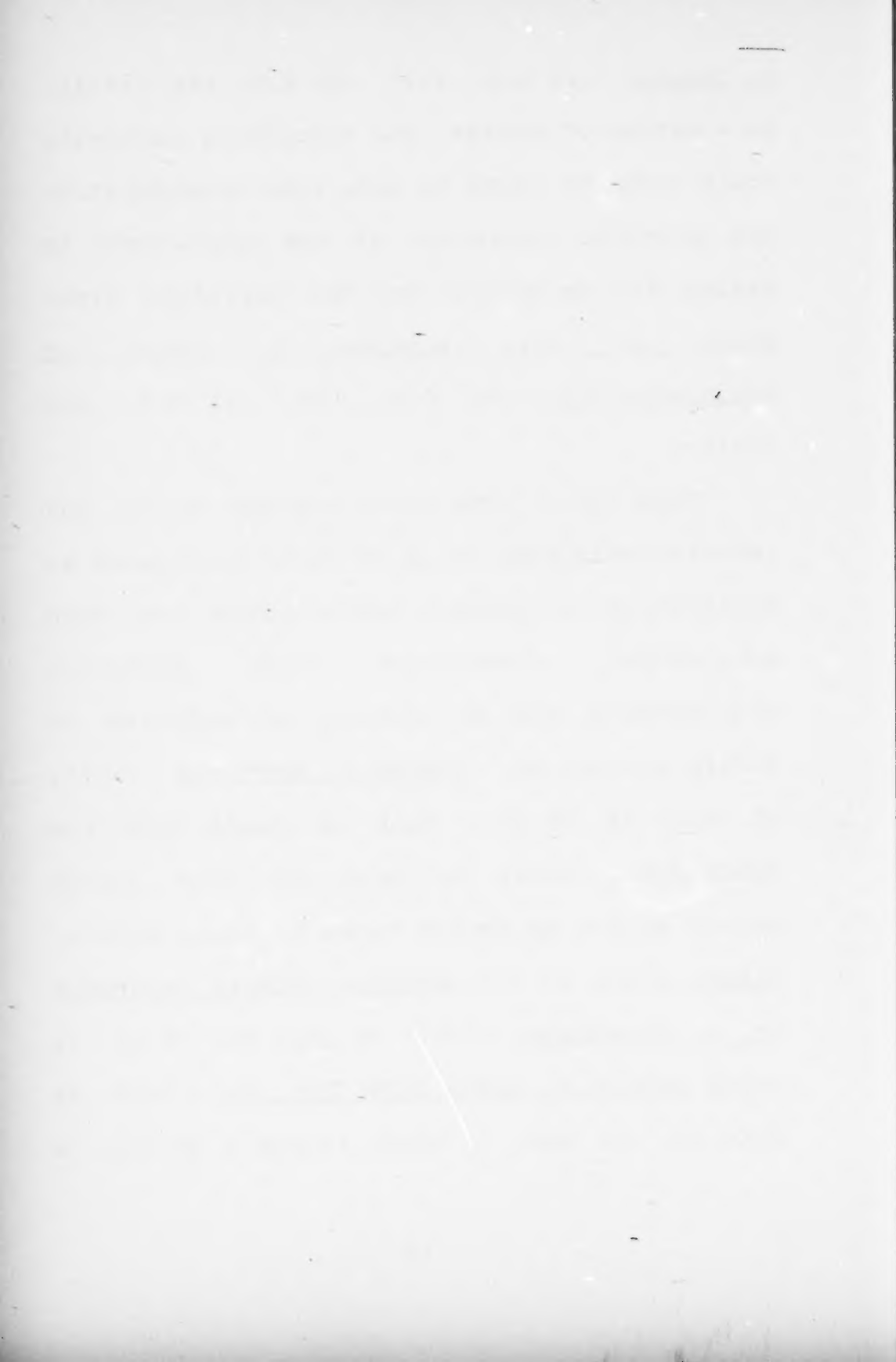


v. Emmons, 128 O.S. 216, 190 N.E. 468 (1934).

As a matter of course, the appointing authority would have the right to take into consideration the physical condition of the applicants in making its selection for the certified list.

State ex rel. Hoskins v. Board of Administration, 920 O.S. 459, 111 N.E. 283 (1915).

This Court (The Ohio Supreme Court) has recently held that it is an error to dismiss an administrative appeal where there has been substantial compliance with statutory requirements and no showing of surprise or unfair prejudice. Fisher v. Mayfield (1987), 30 Ohio St 3d 8. This is based upon the fundamental tenet in Ohio law that courts should strive to decide cases on their merits. Fisher supra at 11; National Mutual Insurance Co. v. Papenhagen (1987) 30 Ohio St. 3d 14, 15 (city DeHart v. Aetna Life Ins. Co. (1982) 69 Ohio St. 2d 189). "This laudable policy is



totally frustrated by the dismissal of an appeal on purely technical grounds without regard to the nature of the error or the fact that it was made in good faith." Papenhagen, supra at 15. Dismissal is a grossly disproportionate sanction where "no conceivable prejudice to the opposing party or to the Court could result from this minor, technical error." Id. at 16. The Court (The Supreme Court) also recently noted that where a party does not claim that "they were misled as to the sense or reason behind the notice of appeal...(and is)...well aware (of)...those facts and these legal determinations which would be the issue of the appeal," it is improper to dismiss an appeal on purely technical grounds. State ex rel. Ormet Corp. v. Burkhardt, (1986), 25 Ohio St. 3d 112, 115. See also, Wells v. Chrysler Corp. (1984), 15 Ohio St. 3d 21, 24.

The Eighth District Court of Appeals denied Petitioner equal protection of the law

in not hearing Petitioner's appeal. The Court's decision upholds a lower ruling which obligates Petitioner to hire an individual whose medical condition and history would make his hiring illegal under Ohio law. Said hiring would also expose Petitioner to potentially greater liability in the event of a third-party action involving Respondent. Enforcement of the law should not result in such a negative impact upon Petitioner nor set precedent for negative impact upon potentially many other parties.

II.

The Eighth District Court Of Appeals Erred And Violated Petitioner's Fourteenth Amendment Right To Equal Protection Under The Law In Failing To Find That The Findings Of The Ohio Civil Rights Commission Were Invalid Because They Were Improperly Filed.

Section 4112-3-09(A) of the Ohio Administrative Code specifically provides:
"Written report and recommendation at the

conclusion of the hearing and upon due consideration of the evidence addressed at the hearing and the oral argument and/or briefs of the parties and the commission attorney, the person or persons conducting the hearing shall submit to the commission, within sixty days, a written report setting forth his or their findings of fact and conclusions of law and a recommendation of action to be taken by the commission." (emphasis added).

The final reply brief of the Ohio Civil Rights Commission was filed on February 22, 1985. Under OAC 4112-3-09(A) the findings of fact and conclusions of law should have been filed within sixty (60) days thereafter. Instead, the findings of fact were not filed until August 14, 1985, one hundred and seventy three (173) days after the reply brief was filed. 'In State, Ex Rel. City of Cincinnati v. Ohio Civil Rights Commission, (1981) 2 Ohio App 3d 287 the Supreme Court of Ohio held: "...it,

(the Ohio Civil Rights Commission) must conform to the conduct of its business to procedures set out in the statutes or in rules adopted by the commission pursuant to statutory grants of authority." at 288. The court further stated: "Here the commission had a duty to do something, rather than simply allowing the complaint against the city to hang in limbo subject to the vagaries of some undefined process." at 288. The Court of Appeals, in its own decision, states "the commission would do well to heed the Supreme Court's admonition in Plumbers & Steamfitters Committee v. Ohio Civil Rights Commission, (1981), 66 Ohio St. 2d 192, 1196:

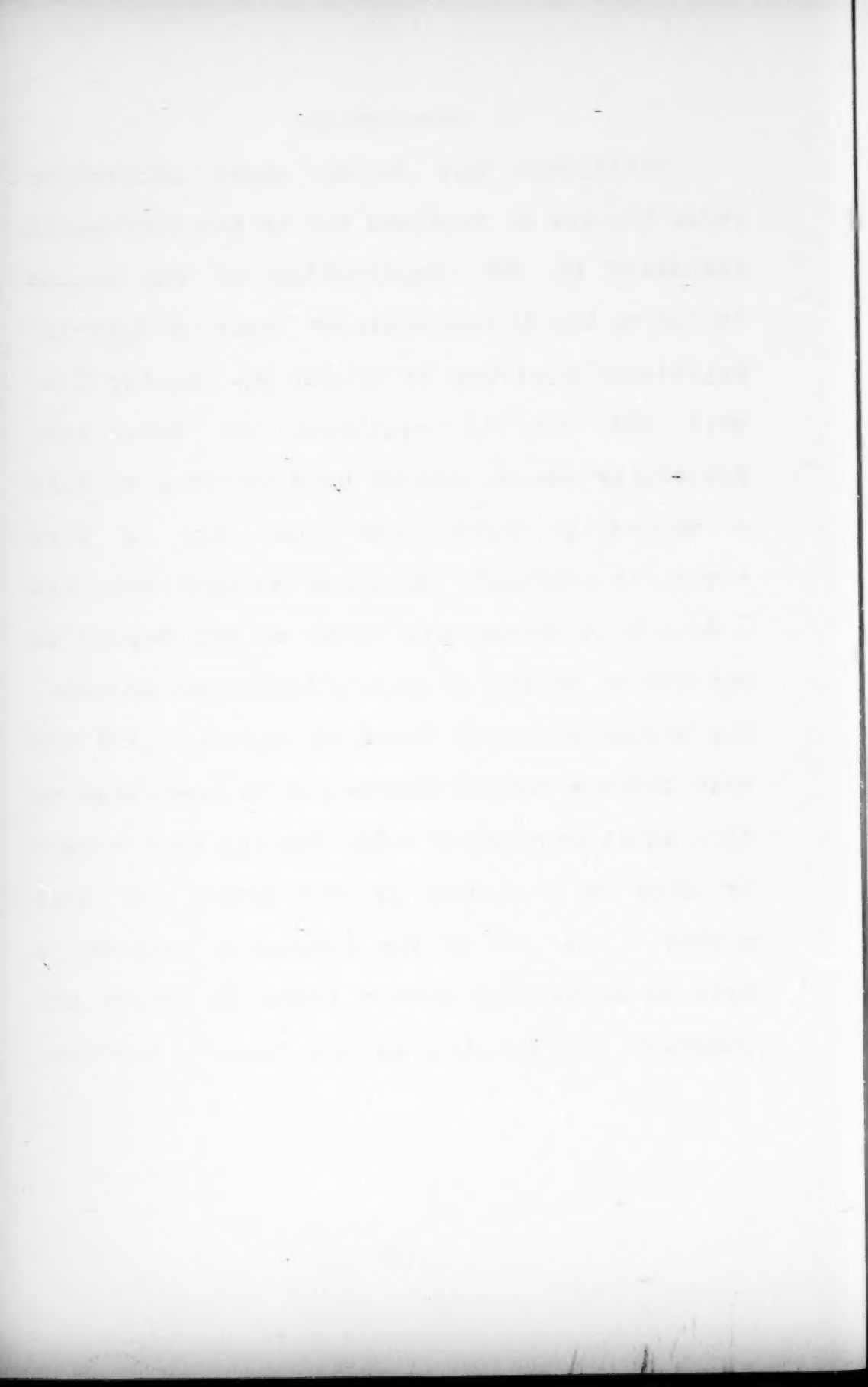
"(U)ndue delay can create serious hardships. Commission orders frequently involve awards of back pay. If the commission acts dilatorily, back pay awards can amount to large sums. Moreover, the longer the delay in resolving a commission complaint, the more

difficult it is to make an aggrieved party whole. Consequently, while we do not find that the 92-day period which elapsed between the commission's receipt of notice of appeal and the commission's certification of the record was unduly lengthy or prejudicial in this case, it behooves the commission to follow its legislative mandate and proceed as expeditiously as possible."

While the Court of Appeals was willing to allow the Civil Rights Commission to operate outside of its rules, it was not willing to approve of Petitioner's interpretation of the ambiguous notice provisions. Thus, that court held to a double standard. The untimeliness of the filing of the hearing examiner was a clear breach of the duty imposed on the Ohio Civil Rights Commission by the Ohio Administrative Code.

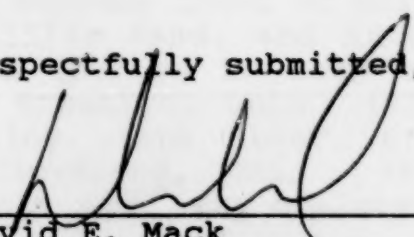
Conclusion

Petitioner was denied equal protection under the law as provided for in the Fourteenth Amendment to the Constitution of the United States by the Eighth District Court of Appeals. Petitioner's giving of notice by regular U.S. mail was not in violation of Ohio law. Petitioner should not be held to have to hire a medically unfit individual for a fire fighter's position. Ohio law further indicates a desire to adjudicate cases on the merits as opposed to ruling on purely technical grounds. The Eighth District Court of Appeals (and the Ohio Supreme Court) should not be permitted to deny equal protection under the law to citizens of Ohio or citizens of any state for that matter. For all of the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth District



Court of Appeals which was denied review by the
Supreme Court of Ohio.

Respectfully submitted,

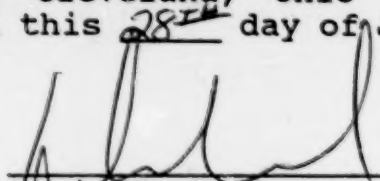


David E. Mack
Wilhelm G. Spiegelberg
City of Garfield Heights
5555 Turney Road
Garfield Heights, Ohio 44125
(216) 475-1100
Attorneys for Petitioner



Certificate of Service

This is to certify that three (3) copies of the foregoing "Petition For Writ of Certiorari From The Supreme Court of Ohio" were sent to each of William Asad, and Anthony J. Celebrezze, Jr. and Charles E. Cook at 7419 Plainfield Avenue, Brooklyn, Ohio 44144 and State Office Building, 12th Floor, 615 West Superior Avenue, Cleveland, Ohio 44113 by regular U.S. mail this 28th day of July, 1989.



David E. Mack
Wilhelm G. Spiegelberg



EXHIBIT A



STATE OF OHIO
CIVIL RIGHTS COMMISSION

IN THE MATTER OF:)	
)	
WILLIAM ASAD)	COMPLAINT NO. 4050
)	
Complainant)	
)	
-vs-)	<u>FINDINGS OF FACT,</u>
)	
CITY OF GARFIELD)	<u>CONCLUSIONS OF LAW,</u>
HEIGHTS)	
)	
Respondent)	<u>AND ORDER</u>

I. PRELIMINARY STATEMENT

This matter comes before the Commission upon the sworn Charge Affidavit of William Asad, Complainant, filed on May 24, 1983; Complaint and Notice of Hearing No. 4050 issued May 15, 1984; the timely Answer of the City of Garfield Heights, Respondent herein; the official record of the public hearing held on September 25, and October 26, 1984 before Franklin A. Martens, Esq., a duly appointed Hearing Examiner, and all exhibits therein; the



post-hearing briefs filed by the Commission on December 31, 1984 and February 22, 1985, and Respondent's brief filed on February 13, 1985.

II. COMMISSION REVIEW

The Charge Affidavit and the Complaint alleged that Respondent refused to hire Complainant as a firefighter in retaliation for having filed a previous charge of unlawful discrimination. On the basis of the entire record before it, the Commission makes the following Findings of Fact, Conclusions of Law and Order.

III. FINDINGS OF FACT

1. William R. Asad filed a sworn charge affidavit with the Commission on May 24, 1983.

2. The Commission determined on December 29, 1983 that it was probable that unlawful discriminatory practices had been engaged in by Respondent in violation of Rev. Code Sec. 4112.02(I).

and having made this of the contents of
the same it is the duty of the
court to give effect to the same.

THE COURT

The Court is of the opinion that the
plaintiff is entitled to recover the
amount of the debt of \$100.00 and
costs. The Court is of the opinion
that the defendant is not entitled
to recover the amount of the debt of
\$100.00 and costs. The Court is of
the opinion that the plaintiff is
entitled to recover the amount of the
debt of \$100.00 and costs.

THE COURT

The Court is of the opinion that the
plaintiff is entitled to recover the
amount of the debt of \$100.00 and
costs. The Court is of the opinion
that the defendant is not entitled
to recover the amount of the debt of
\$100.00 and costs. The Court is of
the opinion that the plaintiff is
entitled to recover the amount of the
debt of \$100.00 and costs.

3. The Commission attempted to eliminate the alleged unlawful discriminatory practices by conciliation. The Commission issued its complaint after conciliation failed.

4. Respondent is a political subdivision of the State of Ohio and an employer.

5. Complainant applied for a firefighter position with Respondent on February 19, 1983. He passed the written civil service examination and the physical agility test. He was examined by the civil service physician and filled out a medical history form on June 29, 1982. He was given a polygraph test on February 5, 1983 and a background check was conducted. His name was placed on the certified list of applicants and sent to the city for a personal interview. He was interviewed by the Safety Director, the Fire Chief, and the Mayor on May 6, 1983.

6. Complainant was questioned in detail during the interview about his medical history form because he answered "yes" to questions "Do

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you now have or have you ever had . . . frequent severe headaches, . . . dizziness or fainting spells, . . . paralysis, . . . shortness of breath, . . . chronic cough, . . . backache, . . . and depression or excessive worry." Complainant was asked about each of these conditions and he explained that they had occurred during his previous firefighting experience with the city of Brooklyn when he sustained an injury fighting a fire. Complainant also explained that he no longer suffered from any of these conditions.

7. Complainant was also questioned in detail about his separation from employment with the Brooklyn Fire Department. He was discharged from that position. One of the interviewing committee also asked Complainant about the circumstances surrounding his dismissal. During that discussion Complainant mentioned he had filed EEOC charges against the City of Brooklyn and had two federal court



suits pending because of discrimination and one in municipal court because of negligence. (Complainant filed a charge with the EEOC and the Commission, naming the City of Brooklyn Fire Department as Respondent, on May 28, 1981, alleging that his national origin, Lebanese, was a determining factor in his discharge.)

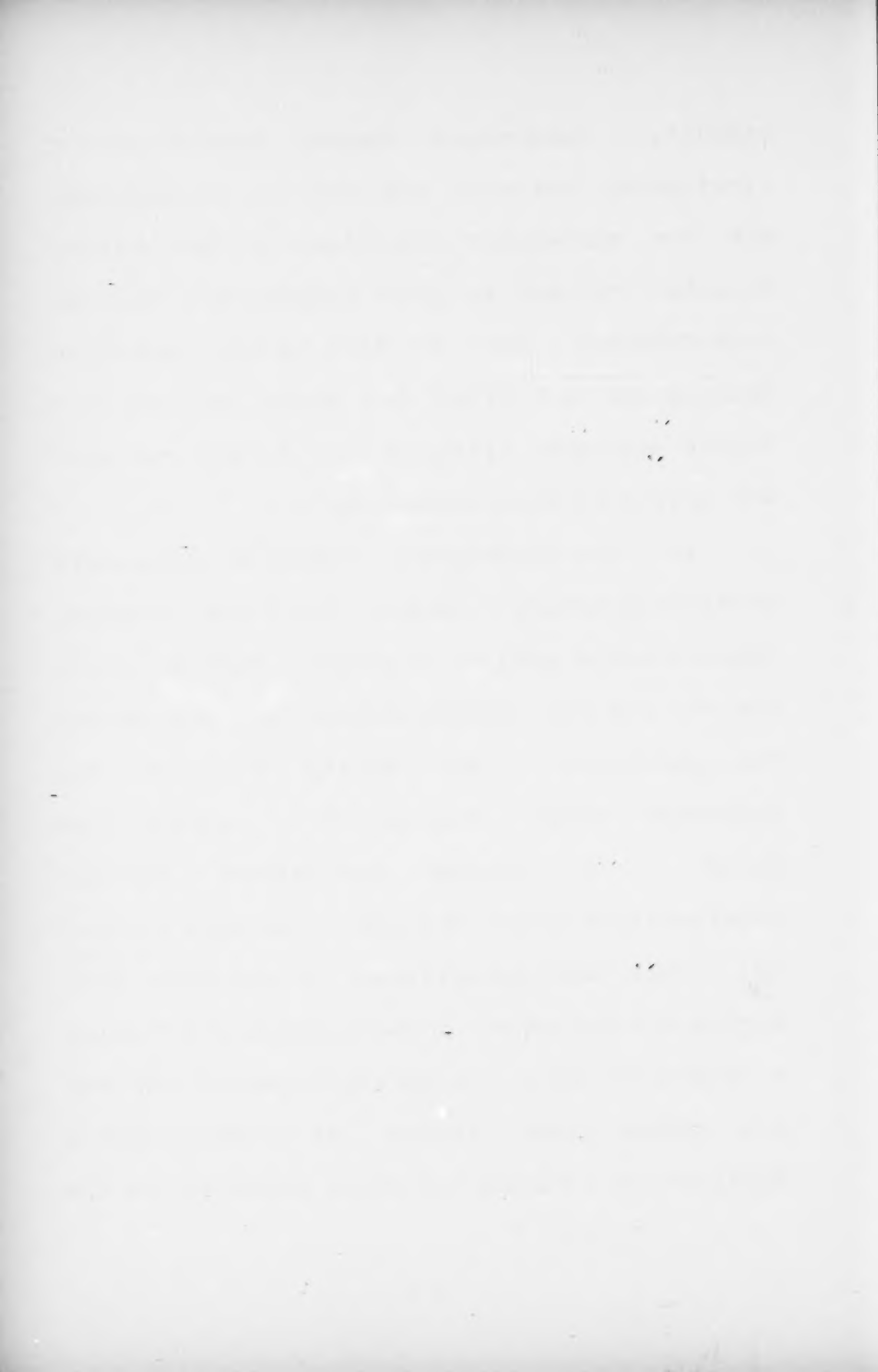
8. Complainant was not chosen for any of the available firefighter positions because the interviewing committee was concerned about his medical history. One member, the safety director, was also concerned about the law suits that Complainant had filed against the City of Brooklyn. He believed Complainant should not be considered further until he cleared up any law suits he had pending against the City of Brooklyn.

9. Complainant filed a charge of discrimination and opposed allegedly unlawful employment practices by filing a lawsuit. Respondent was aware that Complainant filed the



lawsuit. Respondent denied Complainant a firefighter position and refused to consider him for subsequent positions. The Safety Director refused to give Complainant further consideration for a firefighter position because he had filed law suits against his former employer alleging his former employer was guilty of discrimination.

10. The Respondent offered a legitimate nondiscriminatory reason for its action, Complainant's medical history. However, this was not the only reason Complainant was denied the position. The Safety Director was concerned about Complainant's pending law suits. He denied Complainant further consideration until the law suits were cleared up. This was established by evidence that during the selection process Complainant asked a friend to call the Safety Director and ask him about the status of Complainant's application. During the phone conversation the



Safety Director mentioned his concerns about Complainant's medical history and was reassured by the caller that Complainant was a "Mr. Lebanon" and that his current health was excellent. The Safety Directory replied that Complainant needed to "settle those law suits." Therefore, it is logical to conclude that the pending litigation was of equal concern and Complainant was not going to receive consideration until he disposed of the law suits.

11. The evidence in this case shows that Complainant's medical history was not the only reason Complainant was rejected for consideration by the Respondent. Complainant was also rejected for consideration because he filed law suits against his former employer alleging that his discharge was discriminatory.

IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties of this Complaint.

2. The Commission has proven by reliable, probative, and substantial evidence that Respondent has discriminated against Complainant because of retaliation in violation of Section 4112.02(I) of the Revised Code.

V. ORDER

Pursuant to Revised Code Section 4112.05(G), where the Commission has obtained jurisdiction over the parties and over the subject matter of its proceedings, and has proven by reliable, probative, and substantial evidence on the record that Respondent has engaged in unlawful discrimination, the Commission is authorized and obligated to issue the Order which is set forth hereinafter.

1. It is ORDERED that Respondent shall henceforth and forever CEASE AND DESIST from

all practices in violation of Revised Code Section 4112.

2. It is further ORDERED that Respondent offer Complainant the next available position of firefighter. Complainant will be instated with all rights, benefits, seniority, privileges, and rate of pay as if he had been hired as a firefighter in May of 1983. This offer shall be in writing and sent by certified mail.

3. It is further ORDERED that, whether or not Complainant accepts the position offered by Respondent, Respondent pay Complainant the difference between what Complainant has earned in his current firefighter position and what Complainant would have earned had he been employed by Respondent as a firefighter from the date Complainant was first rejected for employment to the date Respondent offers Complainant employment, the deductions to be computed on an annual basis, plus interest at

THE UNIVERSITY OF CHICAGO
CHICAGO, ILL.

TO THE PRESIDENT OF THE UNIVERSITY OF CHICAGO
FROM THE FACULTY OF THE DIVISION OF THE PHYSICAL SCIENCES
DEAR SIR:
We have the honor to acknowledge the receipt of your letter of the 10th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

Very respectfully,
Yours truly,
[Signature]
[Name]
[Title]

the maximum rate allowable by law. The backpay shall include all normal incremental increases of salary and any normally worked overtime. This calculation of backpay continues to run until Complainant is instated pursuant to above Paragraph 2 of this Order or until Respondents make an offer of employment pursuant to Paragraph 2 of this Order and Complainant reject such offer.

This ORDER Issued by the Ohio Civil Rights Commission this 14th day of November, 1985.

/s/ Rev. Phale D. Hale
REV. PHALE D. HALE, Chairman

/s/ Alyce Lucas
ALYCE LUCAS, Member

/s/ Ronald Morgan
RONALD MORGAN, Member

/s/ Catherine Ellis
CATHERINE ELLIS, Member

/s/ Jose Villanueva
JOSE VILLANUEVA, Member

NOTICE OF RIGHT TO JUDICIAL REVIEW

Notice is hereby given to all herein that Revised Code Section 4112.06(A), (B), (E), and (I) set forth the right to obtain judicial review of this ORDER and the mode and procedure thereof.

CERTIFICATE OF SERVICE

I, Robert Brown, Executive Director of the Ohio Civil Rights Commission, do hereby certify that the foregoing is a true and accurate copy of the ORDER Issued In the Matter of William Asad v. City of Garfield Heights, Complaint No. 4050 and filed with the Commission at its Central Office in Columbus, Ohio.

/s/ Robert Brown
ROBERT BROWN
Executive Director

Date: November 14, 1985

EXHIBIT B



THE STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

IN THE COURT
OF COMMON PLEAS
CASE NO. 102724

CITY OF GARFIELD HEIGHTS,)
)
Plaintiff-Appellant,)
)
vs.)
)
WILLIAM ASAD,)
)
Defendant-Appellee.)

JUDGMENT ENTRY

Burt W. Griffin, J.:

This is an appeal from a decision of the Ohio Civil Rights Commission requiring the City of Garfield Heights to hire William Asad as a firefighter. The case is currently before the Court on the Ohio Civil Rights Commission's motion to dismiss and on the briefs of the parties for a decision on the merits of the claim. The Court has previously denied a motion to dismiss filled by appellee Asad.

The City of Garfield Heights seeks reversal on the ground that there was not a proper factual basis for the Commission to



conclude that Asad was denied employment for statutorily prohibited reasons, that the hearing examiner's report was not timely filed in the Commission proceedings and that the Commission failed to make a good faith effort to conciliate and mediate the complaint. The Commission has denied the validity or sufficiency of those claims and further asserts that the appeal should be dismissed because appellant did not properly serve its petition.

The Ohio Civil Rights Commission made the following determination after receiving testimony and reviewing the briefs submitted by the parties:

(VOL 982 PG 139)

* * *

11. The evidence in this case shows that Complainant's medical history was not the only reason Complainant was rejected for consideration by the Respondent. Complainant was also rejected for consideration because he filed lawsuits against his former employer



alleging that his discharge
was discriminatory.

I

The basis for the Commission's finding of prohibited conduct was that Garfield Heights was found to have violated R.C. §4112.02(I) making it unlawful "for any person to discriminate in any manner against any person . . . because that person has made a charge . . . under Section 4112.01 to 4112.07 of the Revised Code." The Court must uphold the Commission if there is reliable, probative, and substantial evidence to support its finding. Plumbers & Steamfitters v. Ohio Civil Rights Commission, 66 Ohio St. 2d 192 (1981).

A review of the record shows ample probative and reliable evidence for that conclusion. Testimony affirmed that the responsible Garfield Heights officials knew of Asad's complaint against the City of Brooklyn for employment discrimination and one of those

THE HISTORY OF THE
REPUBLIC OF THE UNITED STATES

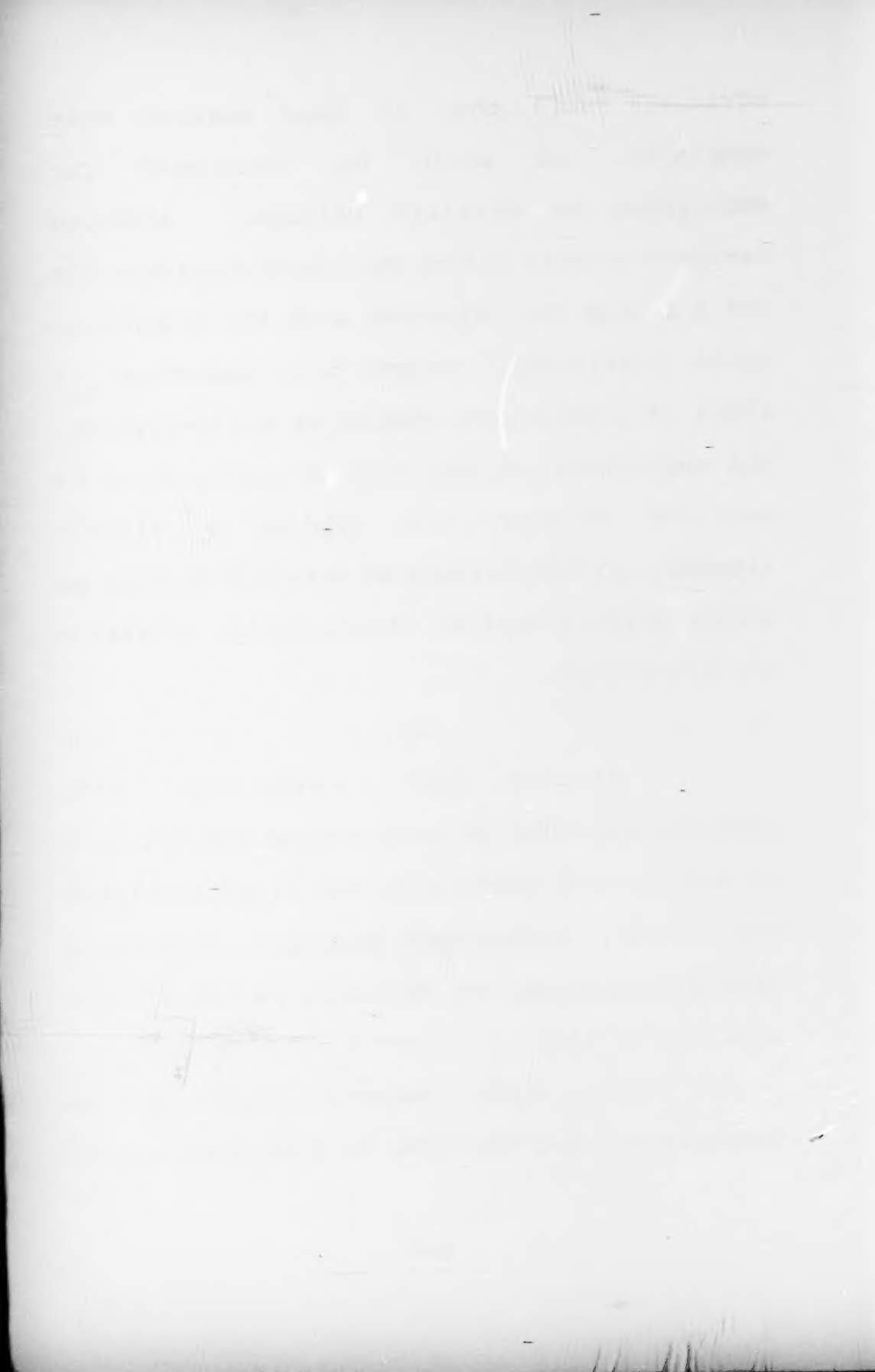
The history of the United States is a story of growth and change. From the first settlers to the present day, the nation has evolved through various stages of development. The early years were marked by exploration and the establishment of colonies. The American Revolution led to the birth of a new nation, and the subsequent years saw the expansion of territory and the growth of industry. The Civil War was a pivotal moment in the nation's history, leading to the abolition of slavery and the strengthening of the federal government. The late 19th and early 20th centuries were characterized by rapid industrialization and the rise of the United States as a world power. The mid-20th century saw the nation's involvement in two world wars, which further solidified its position as a global superpower. The latter half of the 20th century was marked by social and political movements that sought to address issues of civil rights, environmental protection, and government reform. The present day is a time of continued growth and change, with the United States facing new challenges and opportunities in the 21st century.

officials said that if Asad settled that complaint, he would be considered for employment by Garfield Heights. Although Garfield Heights claims that such complaint was not a reason for rejecting Asad the Commission could justifiably reject that assertion in light of Asad's past record as a firefighter, his employment at the time of application to Garfield Heights, his holding a pilot's license, and the failure of Garfield Heights to pursue fully a medical determination of Asad's qualifications.

II

Revised Code 4112.05(B) also requires the OCRC to make a good faith effort to mediate and conciliate the dispute between the parties. Harbor Park Marinas v. Ohio Civil Rights Commission, 64 Ohio App. 2e 120 (1978). (VOL 982 PG 140)

The City asserts that it is inconsistent for the OCRC to find that a pre-



hire medical examination is illegal and then to mediate the dispute by requiring a new, pre-hire medical examination. As Garfield Heights correctly asserts, there is no legal basis to conclude that a pre-hire examination is illegal. The apparent inconsistencies in the position of the OCRC does not render its mediation attempt invalid; and, in fact, the record does not support a claim that the Commission failed to attempt to mediate and conciliate the complaint.

III

Section 4112-3-09(A) of the Ohio Administrative Code provides that the hearing examiner shall issue written findings within sixty (60) days of the hearing. In the present case, one hundred seventy-three (173) days passed between the hearing and the issuance of written findings. Neither the Administrative Code nor the Revised Code provide that failure of the hearing examiner to file timely his



written findings will render those findings or their adoption by the OCRC invalid.

In State ex rel. City of Cincinnati v. Ohio Civil Rights Commission, 2 Ohio App. 3d 287 (1981), the petitioner sought a writ of mandamus directing the OCRC to dismiss a complaint because the evidentiary hearing was reopened following the complainant's untimely objections to the written report. The court found that the OCRC lacked authority to permit such tardy objections. The court issued the writ of mandamus ordering the OCRC to do that which it would have done if it had not erred in permitting the tardy objections--dismiss the complaint.

The facts in the case relied upon by the City are readily distinguished from the case at bar. Neither the City nor Mr Asad was prejudiced by any act

(VOL 982 PG 141)



of the hearing examiner or the OCRC in delaying the issuance of the written findings.

Since the decision of the Commission is supported by reliable, probative and substantial evidence and is in accordance with law, the decision of Ohio Civil Rights Commission is affirmed.

IT IS SO ORDERED.

/s/ Burt W. Griffin
BURT W. GRIFFIN, JUDGE

DATED: September 16, 1987

RECEIVED FOR FILING
SEP 17 1987

By Gerald E. Fuerst



NOTICE OF SERVICE

A copy of the foregoing Judgment Entry has been sent via ordinary U. S. Mail on this 16th day of September, 1987, to Anthony J. Celebrezze, Jr., Ohio Attorney General, and Diane J. Karpinski, Assistant Attorney General, 800 State Office Building, 615 West Superior Avenue, Cleveland, Ohio 44113-1 and to David E. Mack, Director of Law, City of Garfield Heights, 5555 Turney Road, Garfield Heights, Ohio 44125.

/s/ Burt W. Griffin, Judge
BURT W. GRIFFIN, JUDGE

(VOL 982 PG 142)



EXHIBIT C

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 54615

CITY OF GARFIELD HEIGHTS :	:	JOURNAL ENTRY
Plaintiff-Appellant :	:	
-vs- :	:	and
WILLIAM ASAD :	:	OPINION
Defendant-Appellee :	:	RECEIVED
	:	NOV 14 1988
	:	Law Department
	:	City of Garfield Hts.

DATE OF ANNOUNCEMENT OF DECISION: NOV 10 1988

CHARACTER OF
PROCEEDING: Civil appeal from
Common Pleas Court
Case No. 102,724

JUDGMENT: Dismissed.

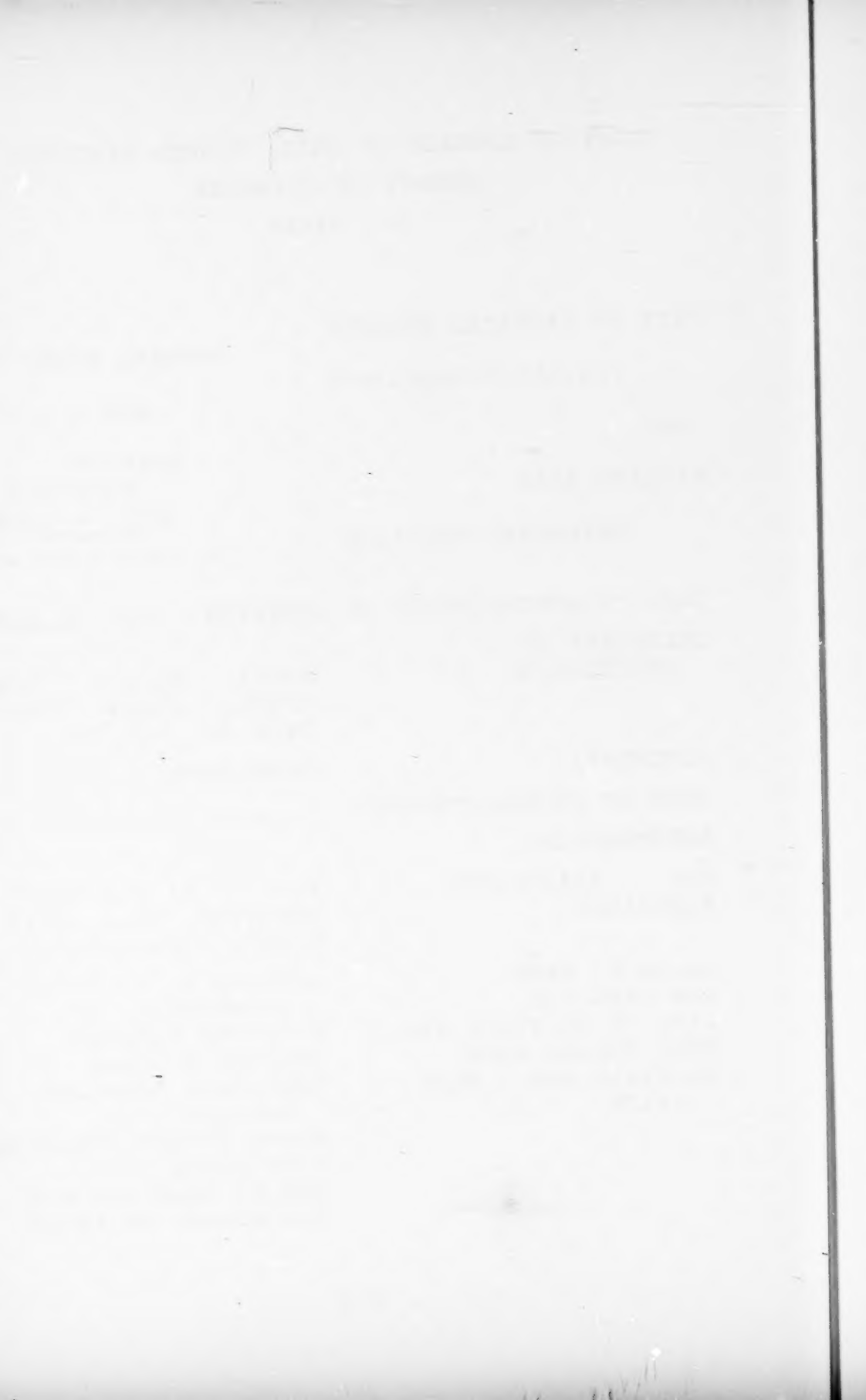
DATE OF JOURNALIZATION: _____

APPEARANCES:

For Plaintiff-Appellant:	For Defendant-Appellee Ohio Civil Rights Commission:
--------------------------	--

David E. Mack
Law Director
City of Garfield Hts.
5555 Turner Road
Garfield Hts., Ohio
44125

Anthony J.
Celebrezze, Jr.
Attorney General
Charles E. Cook
Assistant Attorney
General
State Office Building
12th Floor
615 W. Superior Ave.
Cleveland, OH 44113



2

Ann McManamon, J. The Ohio Civil Rights Commission ("the commission") determined that the city of Garfield Heights ("the city") unlawfully discriminated against William Asad when it refused to hire him as a firefighter in May 1983. The common pleas court affirmed the commission and the city now appeals that decision, raising three assignments of error.

At the outset we must address the commission's contention that the common pleas court lacked subject matter jurisdiction to hear the appeal. Although the commission raised this issue below by a motion which was never ruled upon, the commission has addressed the matter in this court with a "Supplemental Citation to Authority." Upon considering the supplemental authority we conclude this appeal must be dismissed.

The jurisdictional defect in this case arises from the method of service employed by the city to initiate its action in the common

pleas court. The city filed its petition with the court and served the other parties by ordinary mail. This court has since held that an action for judicial review pursuant to R.C. 4112.06 may be commenced only by service through the clerk of courts in accordance with Civ. R. 3 and 4. Cleveland v. Ohio Civil Rights Comm. (Dec. 24, 1987), Cuyahoga App. No. 53095, unreported. Since the action was not properly commenced below, the court never acquired subject matter jurisdiction. Id.

Our decision in Cleveland, supra, disposes of most of the arguments the city raised in response to the commission's motion. Although the city noted the absence of any prejudice to the commission from the faulty service, and we agree the commission suffered no detriment, prejudice was not the basis of our decision in Cleveland. Id. at 8-9. The city argued, without citation to legal authority, that the commission lacked standing to raise the issue.

Since the commission was unquestionably a party to the review proceedings, we see no lack of standing.

Finally, the city complained that since the hearing examiner's findings were untimely filed, Asad's claim was void from the outset. The examiner was required to present his findings within sixty days after the filing of the post-hearing briefs. Ohio Adm. Code 4112-3-09(A). In this case one hundred seventy-three days elapsed before the findings were submitted. Although this delay was inexplicable, we fail to see how it implicated the jurisdiction of the commission. Nevertheless, the commission would do well to heed the supreme court's admonition in Plumbers & Steamfitters Commt. v. Ohio Civil Rights Comm. (1981), 66 Ohio St. 2d 192, 196:

"[U]ndue delay can create serious hardships. Commission orders frequently involve awards of back pay. If the commission acts dilatorily, back pay awards can amount to large sums. Moreover, the longer the delay in resolving a

commission complaint, the more difficult it is to make an aggrieved party whole. Consequently, while we do not find that the 92-day period which elapsed between the commission's receipt of notice of appeal and the commission's certification of the record was unduly lengthy or prejudicial in this case, it behooves the commission to follow its legislative mandate and proceed as 'expeditiously as possible.'"

Accordingly, the appeal is dismissed.

Appeal dismissed.



It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CORRIGAN, J., and _____

PARRINO, J., CONCUR

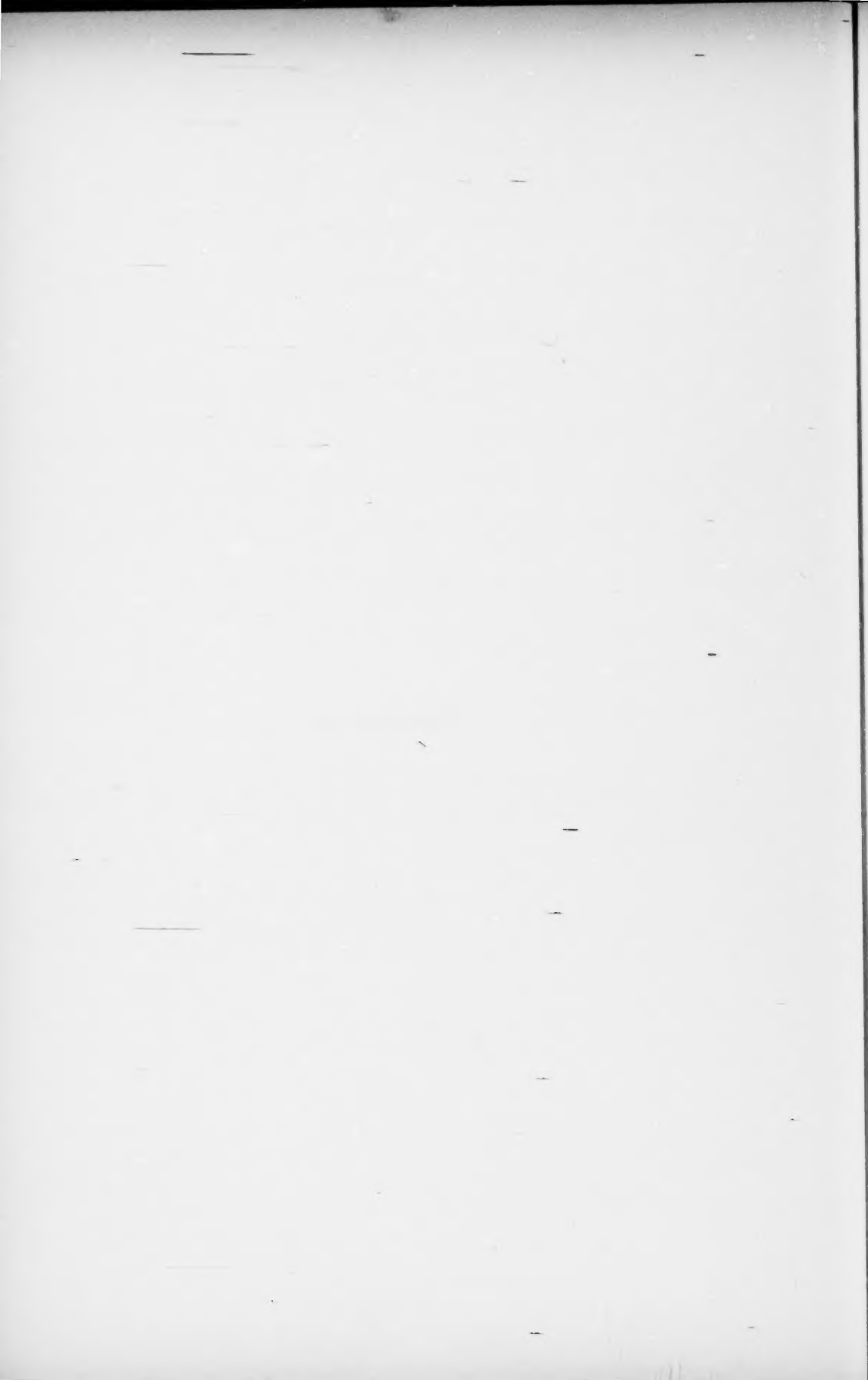
(Judge Thomas J. Parrino, retired of the Eighth District Court of Appeals, sitting by assignment).

/s/ Ann McManamon
PRESIDING JUDGE
ANN McMANAMON

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.



EXHIBIT D



THE SUPREME COURT OF OHIO

1989 TERM

To wit: February 15, 1989

City of Garfield Heights, :	
Appellant, :	Case No. 89-30
v. :	E N T R Y
William Asad, :	
Appellee. :	

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, \$20.00, paid by City of Garfield Heights.

(Court of Appeals No. 54615)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

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City of Garfield Hts.

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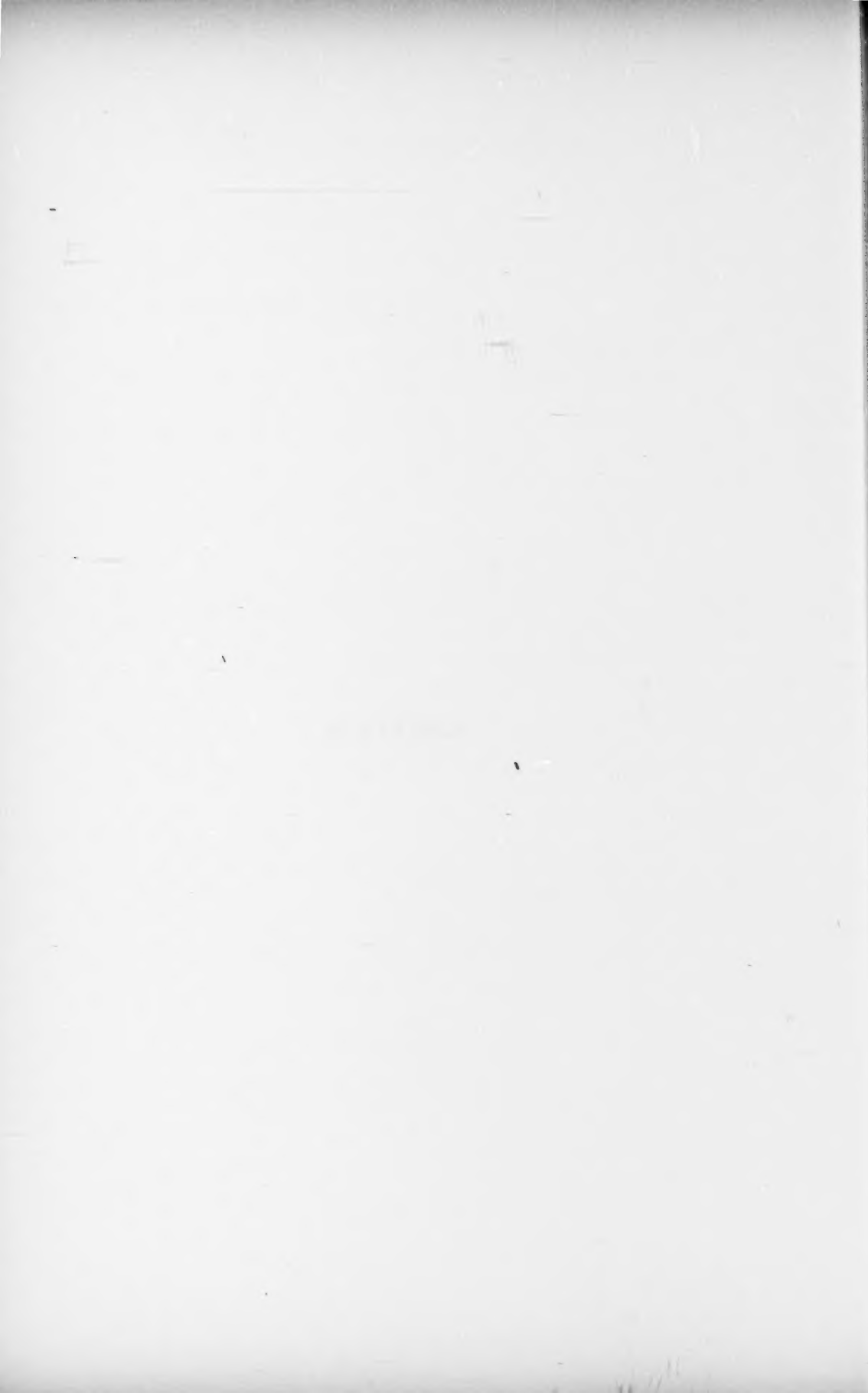
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EXHIBIT E



THE SUPREME COURT OF OHIO

1989 TERM

To wit: March 22, 1989

City of Garfield Heights,:	Case No. 89-30
Appellant,	:
v.	: REHEARING ENTRY
William Asad,	: (Cuyahoga County)
Appellee.	:

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 54615)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

RECEIVED
MAR 24 1989
Law Department
City of Garfield Hts.

89
No. 89-180

FILED

SEP 23 1989

JOSEPH F. SEANIEL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

CITY OF GARFIELD HEIGHTS,
Petitioner,

vs.

THE OHIO CIVIL RIGHTS COMMISSION
and WILLIAM ASAD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO **PETITION FOR WRIT OF CERTIORARI**

ANTHONY J. CELEBREZZE, JR.
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CHARLES E. COOK, Counsel of Record
Assistant Attorney General
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Attorneys for Petitioner

LULA M. ANDERSON, Of Counsel
Chief, Civil Rights Section
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Columbus, Ohio 43215
(614) 466-7900
Attorneys for Appellee
Ohio Civil Rights Commission

QUESTIONS PRESENTED FOR REVIEW

1. Did the Supreme Court of the State of Ohio violate Petitioner's Fourteenth Amendment due process rights in denying review of the Eighth District Court of Appeals decision which determined Respondent could prevail over Petitioner on the basis that Petitioner failed to give Respondent proper notice of its appeal of an Ohio Civil Rights Commission Final Order pursuant to Rules 3(A) and 4(A) of the Ohio Rules of Civil Procedure?

2. Where reliable, probative and substantial evidence on the record supports the Ohio Civil Rights Commission's findings of discrimination pursuant to Ohio Revised Code §4112.02(A), as affirmed by two Cuyahoga County, Ohio Courts: the Court of Common Pleas and the Court of Appeals, Eighth District, and there is no federal question involved is there any reason for the Supreme Court of the United States to review the state court's decision?

3. Did the Eighth District Court of Appeals err and violate Petitioner's Fourteenth Amendment right to equal protection under the law in failing to find that the findings of the Ohio Civil Rights Commission were invalid because they were filed after the time period provided by the Ohio Administrative Code?

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<p>II. Where reliable, probative and substantial evidence on the record supports the Ohio Civil Rights Commission's findings of discrimination pursuant to Ohio Revised Code §4112.02(A), as affirmed by two Cuyahoga County, Ohio Courts: the Court of Common Pleas and the Court of Appeals, Eighth District, and there is no federal question involved, there is no reason for the Supreme Court of the United States to review the state court's decision</p>		8
<p>III. The Eighth District Court of Appeals did not err and violate Petitioner's Fourteenth Amendment right to equal protection under</p>		

the law in failing to find that the findings of
the Ohio Civil Rights Commission were invalid
because they were filed after the due date 9

Conclusion 10

Appendix:

Ohio Revised Code, Section 4112.02(A) and (I) A1

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Ohio Rules of Civil Procedure, Rule 3(A) A6

Ohio Rules of Civil Procedure, Rule 4(A) & 4(B) A9

Constitution of the State of Ohio Art. IV, Section
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TABLE OF AUTHORITIES

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<i>City of Cleveland v. Ohio Civil Rights Commission, et al.</i> , 43 Ohio App. 3d 153 (1988)	7
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No. 89-180

IN THE
Supreme Court of the United States

October Term, 1989

CITY OF GARFIELD HEIGHTS,
Petitioner,

vs.

THE OHIO CIVIL RIGHTS COMMISSION
and WILLIAM ASAD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

THE HISTORY OF THE

REIGN OF KING CHARLES THE FIRST

BY JOHN BURNET

IN TWO VOLUMES

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Printed by J. Sturges, at the Angel in St. Dunstons Church-yard, 1724

By Authority

W. B. Burnet

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By Authority

W. B. Burnet

**STATUTES, RULES AND
CONSTITUTION INVOLVED***

Ohio Revised Code, 4112.02(A) and (I)

Ohio Revised Code, Section 4112.05(B)

Ohio Revised Code, Section 4112.06

Ohio Rules of Civil Procedure, Rule 3(A)

Ohio Rules of Civil Procedure, Rule 4(A) and 4(B)

Constitution of the State of Ohio, Article IV,
Section 5(B)

* The text of these provisions is reproduced in full in the Appendix.

STATEMENT OF THE CASE

This action arose out of a charge affidavit filed by William Asad with the Equal Employment Opportunity Commission (hereinafter "EEOC"), on May 24, 1983. It was deferred to and received by the Cleveland Regional Office of the Ohio Civil Rights Commission (hereinafter "Commission"), on June 3, 1983. In his charge affidavit, Asad alleged that on May 18, 1983, the City of Garfield Heights (hereinafter "City"), refused to hire him for the position of firefighter in retaliation for his having filed previous charges of discrimination with the EEOC against his previous employer, the Brooklyn Fire Department.

After receiving the charge of discrimination, the Commission conducted a preliminary investigation pursuant to Section 4112.05(B) of the Ohio Revised Code (App. A1). On December 29, 1983, the Commission determined it was probable that the City committed an unlawful discriminatory practice in violation of Revised Code 4112.02(I). Subsequent to the finding of probable cause, the Commission made good faith efforts to conciliate the charge filed by Mr. Asad, but such efforts failed.

On May 15, 1984, the Commission issued Complaint and Notice of Hearing No. 4050. The City filed its Answer to the Complaint on June 15, 1984. On September 24 and 25, 1984 and October 26, 1984, a bifurcated hearing was held before Franklin A. Martens, Esq., a duly appointed Hearing Examiner of the Commission.

After receiving the hearing transcript, Commission counsel filed its brief on December 31, 1984 and the City filed its brief on February 13, 1985. The Commission

filed a reply brief on February 22, 1985. On August 14, 1985, the Hearing Examiner issued his report. The Examiner concluded that the City had violated Chapter 4112 of the Revised Code when it rejected Mr. Asad for employment as a firefighter. In his Report, the Hearing Examiner made specific recommendations regarding an offer of employment and back pay. On August 30, 1985, the City filed objections to the Examiner's Report. The Commission approved the recommendations of the Hearing Examiner and issued its Findings of Fact, Conclusions of Law and Order on November 14, 1985.

The City filed a petition for judicial review on December 24, 1985, naming only Mr. Asad as a Defendant. The City served both Mr. Asad and the Ohio Civil Rights Commission by ordinary mail. Neither was served by the Clerk of Courts.

The Commission filed a Motion to Dismiss for lack of subject matter jurisdiction. The Court denied this motion on January 16, 1987, and established a briefing schedule. The Commission received Appellant's brief on January 30, 1987. During a status call on March 2, 1987, the Court granted the Commission leave to file its brief *instanter*.

On September 16, 1987, the Honorable Burt W. Griffin, Judge, Court of Common Pleas, Cuyahoga County, Ohio issued a Judgment Entry *City of Garfield Heights v. William Asad, et al.*, No. 102724 (Cuyahoga County C.C.P. Sept. 16, 1987) (unreported), stating that "since the decision of the Commission is supported by reliable, probative and substantial evidence and in accordance with the law, the decision of the Ohio Civil Rights Commission is affirmed." (Pet. App. B-1). However, Judge Griffin did not rule on the issue of proper service.

The City of Garfield Heights timely appealed Judge Griffin's decision to the Court of Appeals of Ohio, Eighth District, Cuyahoga County. On November 10th, 1988, the Court of Appeals dismissed the appeal, and in so doing, noted that proper service was never made on the Respondents by the City, thereby, denying proper jurisdiction of subject matter to the Courts. *City of Garfield Heights v. William Asad, et al.*, No. 54615 (Cuyahoga County Ct. App. Nov. 10, 1988) (unreported).

The City timely appealed to the Supreme Court of Ohio and on February 15, 1989, the Supreme Court of Ohio dismissed the appeal sua sponte for the reason that no substantial constitutional question existed therein. *City of Garfield Heights v. Ohio Civil Rights Commission, et al.*, No. 89-30 (State of Ohio Supt. Ct. Feb. 15, 1989) (unreported) (Pet. App. D-1).

The City timely filed a request for a rehearing. On March 22, 1989 the Supreme Court of Ohio ordered that the rehearing be denied. *City of Garfield Heights v. Ohio Civil Rights Commission, et al.*, No. 89-30 (State of Ohio Sup. Ct. Feb. 15, 1989) (unreported) *reh'g denied* (March 22, 1989) (Pet. App. E-1).

The City of Garfield Heights, Ohio now petitions the Supreme Court of the United States for a Writ of Certiorari, which the Respondents, Ohio Civil Rights Commission and William Asad oppose.

REASONS FOR DENYING THE WRIT

I. Due Process. The Supreme Court of the State of Ohio did not violate Petitioner's Fourteenth Amendment due process rights in denying review of the Eighth District Court of Appeals decision which determined Respondent could prevail over Petitioner on the basis that Petitioner failed to give Respondent proper notice of its appeal of an Ohio Civil Rights Commission's Final Order pursuant to Rules 3(A) and 4(A) of the Ohio Rules of Civil Procedure.

The United States Supreme Court in the past has indicated its views on the subject of the Fourteenth Amendment due process rights which are guaranteed by the United States Constitution.

The Court stated the following:

"Rehearings or new trials are not essential to due process of law, either in judicial or administrative proceedings." *James v. Appel*, 192 U.S. 129 (1904).

"Point at which litigation must cease can be determined by legislative power of state, for right of appeal is not essential to due process of law." *Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912).

"If full and fair trial on merits is provided, due process clause of Fourteenth Amendment does not require state to provide appellate review." *Lindsey v. Mornet*, 405 U.S. 56 (1972).

In the case sub judice, the petitioner, City of Garfield Heights was accorded and had the advantage of an evidentiary hearing at the Commission level; exercised its right of judicial review at the Court of Common Pleas level; further exercised its right of appeal at the Appellate Court level; exercised its right of appeal at the State of Ohio Supreme Court level; and now the

petitioner is exercising its rights to file a "Petition for Writ of Certiorari" in the Supreme Court of the United States.

The Ohio Constitution in Section 5(B) of Article IV conferred rule making power upon the Supreme Court of Ohio. The latest Supreme Court review of the Rules of Civil Procedure was submitted to the 108th General Assembly in 1969 and approved by said General Assembly in 1970.

Rule 3(A) of the Ohio Rules of Civil Procedure states that: "A civil action is commenced by filing a complaint with the court if service is obtained within one year from such filing." (App. A6).

Rule 4(A) of the Ohio Rules of Civil Procedure states that: "Upon filing of the complaint the clerk shall forthwith issue a summons for service upon each defendant listed in the caption. Upon request of the plaintiff separate or additional summons shall issue at any time against any defendant." (App. A9).

When the petitioner appealed the Ohio Civil Rights Commission's final order to the Court of Common Pleas, the petitioner failed to comply with Rules 3(A) and 4(A) of the Ohio Rules of Civil Procedure thereby not perfecting good service.

Although the Court of Common Pleas failed to rule on the "service issue," the Eighth District Court of Appeals ruled on that issue by stating an action for judicial review pursuant to R.C. 4112.06 may be commenced only by service through the clerk of courts in accordance with Civil Rules 3 and 4 of Ohio Rules of Civil Procedure (App. A6-A10). The Court of Appeals further stated that since the action was not properly commenced below, the court never acquired jurisdiction

of the subject matter. The Court of Appeals dismissed the City of Garfield Heights' appeal. *City of Garfield Heights*, No. 54615 (Cuyahoga Ct. App. Nov. 10, 1988) (Pet. App. C-1). The City timely appealed to the Supreme Court of Ohio where the appeal was dismissed (Pet. App. D-1), and re-hearing denied. *City of Garfield Heights*, No. 89-30 (State of Ohio Sup. Ct. Feb. 15, 1989), *reh'g. denied* (March 22, 1989) (Pet. App. E-1).

The same issue pertaining to applicability of Civil Rules 3(A) and 4(A) of the Ohio Rules of Civil Procedure was previously ruled upon by the Eighth District Court of Appeals in *Cleveland v. Ohio Civil Rights Commission*, 43 Ohio App. 3rd 153 (1988). This decision was followed by the Court of Appeals for the Eighth District in the present case the *City of Garfield Heights*, No. 54614 (Cuyahoga County Ct. App., Nov. 10, 1988) which held that because of non-compliance with these rules the court never acquired jurisdiction of the subject matter. (*Id.*) That case was also appealed to the Supreme Court of Ohio, the appeal was dismissed and was overruled and rehearing denied. *City of Cleveland*, No. 88-461 (State of Ohio Sup. Ct. May 11, 1988).

II. Where reliable, probative and substantial evidence on the record supports the Ohio Civil Rights Commission's findings of discrimination pursuant to Ohio Revised Code § 4112.02(A), as affirmed by two Cuyahoga County, Ohio Courts: the Court of Common Pleas and the Court of Appeals, Eighth District, and there is no federal question involved, there is no reason for the Supreme Court of the United States to review the state court's decision.

The Honorable Burt W. Griffin, Judge of the Court of Common Pleas, Cuyahoga County, Ohio stated that there was ample probative, reliable, and substantial evidence to support the Ohio Civil Rights Commission's findings. *City of Garfield Heights v. Asad*, No. 102724 (Cuyahoga County C.C.P. Sept. 16, 1987) (Pet. App. B-1).

The City of Garfield Heights had its case heard on the merits at the hearing level before the Commission; and, had its case reviewed on the merits before the Court of Common Pleas (Pet. App. B-1) and the Court of Appeals, Eighth District (Pet. App. C-1) both of Cuyahoga County, Ohio. Both Courts held against the City of Garfield Heights on issues appealed on the merits. Although, the Court of Common Pleas did not rule on the procedural issue involving Civil Rules 3(A) and 4(A) of the Ohio Rules of Civil Procedure, the Court of Appeals Eighth District did, and, held that non-compliance with those rules denied the courts jurisdiction of the subject-matter. *City of Garfield Heights v. Asad*, No. 54615 (Cuyahoga County Ct. App. Nov. 10, 1988).

III. The Eighth District Court of Appeals did not err and did not violate Petitioner's Fourteenth Amendment right to equal protection under the law in failing to find that the findings of the Ohio Civil Rights Commission were invalid because they were filed after the due date.

The Petitioner's rights under the Fourteenth Amendment of the U.S. Constitution were not violated because the Eighth District Court of Appeals (Pet. App. C-1) did hold that the Commission's finding, although filed after the due date, were not invalid. The court stated that it failed to see how the delay implicated the Commission's jurisdiction. Judge Burt W. Griffin of the Court of Common Pleas, *City of Garfield Heights v. Asad*, No. 102724 (Cuyahoga County, C.C.P. Sept. 16, 1987), stated that neither the Ohio Administrative Code nor the Ohio Revised Code provide that failure of the hearing examiner to file timely his written findings will render those findings or their adoption by the Commission invalid, *Id.*

CONCLUSION

The Petitioner, City of Garfield Heights, Ohio has utilized the court system of the State of Ohio to the fullest extent in litigating its cause of action. The Petitioner was afforded a full evidentiary hearing before a Hearing Examiner at the administrative level in which the Commission made a finding of discrimination.

The Petitioner appealed the Commission's discrimination finding to the Court of Common Pleas but failed to comply with Civil Rules 3(A) and 4(A) of the Ohio Rules of Civil Procedure. The Court of Common Pleas did not rule on the procedural rules violation, but did affirm the Commission's findings of discrimination. The Petitioner appealed the Court of Common Pleas decision to the Court of Appeals Eighth District, Cuyahoga County, which after discussing the merits of the case and Civil Rules 3(A) and 4(A), dismissed the appeal. This dismissal resulted in the Petitioner filing an appeal in the Supreme Court of Ohio which court dismissed the appeal sua sponte for the reason that no substantial constitutional question existed therein. Re-hearing was also denied.

Accordingly, Respondent, the Ohio Civil Rights Commission, respectfully urges the Supreme Court of the United States to deny the Petition for Writ of Certiorari of the City of Garfield Heights, Ohio for the reason, that no constitutional question exists therein.

Respectfully submitted,

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APPENDIX

OHIO REVISED CODE

§4112.02 Unlawful discriminatory practices.

It shall be unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

* * * * *

(I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful practice defined in this section, or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

§4112.05(B)

(B) Whenever it is charged in writing and under oath by a person, referred to as the complainant, that any person, referred to as the respondent, has engaged or is engaging in unlawful discriminatory practices, or upon its own initiative in matters relating to any of the unlawful discriminatory practices enumerated in division (A), (B), (C), (D), (E), (F), (I), or (J) of section 4112.02, or section 4112.021 [4112.02.1] of the Revised Code, the commission may initiate a preliminary investigation. Such charge shall be filed with the commission within six months after the alleged unlawful discriminatory

practices are committed. If it determines after such investigation that it is not probable that unlawful discriminatory practices have been or are being engaged in, it shall notify the complainant that it has so determined and that it will not issue a complaint in the matter. If it determines after such investigation that it is probable that unlawful discriminatory practices have been or are being engaged in, it shall endeavor to eliminate such practices by informal methods of conference, conciliation, and persuasion. Nothing said or done during such endeavors shall be disclosed by any member of the commission or its staff or be used as evidence in any subsequent proceeding. If, after such investigation and conference, the commission is satisfied that any unlawful discriminatory practice of the respondent will be eliminated, it may treat the complaint as conciliated, and entry of such disposition shall be made on the records of the commission. If the commission fails to effect the elimination of such unlawful discriminatory practices and to obtain voluntary compliance with Chapter 4112. of the Revised Code, or, if the circumstances warrant, in advance of any such preliminary investigation or endeavors, and if, with respect to an alleged violation of division (H) of section 4112.02 of the Revised Code, the commission finds that the complainant acted with intention of fulfilling any contracts or agreements he was seeking, the commission shall issue and cause to be served upon any person or respondent a complaint stating the charges in that respect and containing a notice of hearing before the commission, a member thereof, or a hearing examiner at a place therein fixed to be held not less than ten days after the service of such complaint. Such place of hearing shall be within the county where the alleged unlawful discriminatory practice has occurred or where the

respondent resides or transacts business. The attorney general shall represent the commission at such hearing and present the evidence in support of the complaint. Any complaint issued pursuant to this section must be so issued within two years after the alleged unlawful discriminatory practices were committed.

4112.06 Judicial review

(A) Any complainant, or respondent claiming to be aggrieved by a final order of the commission, including a refusal to issue a complaint, may obtain judicial review thereof, and the commission may obtain an order of court for the enforcement of its final orders, in a proceeding as provided in this section. Such proceeding shall be brought in the common pleas court of the state within any county wherein the unlawful discriminatory practice which is the subject of the commission's order was committed or wherein any respondent required in the order to cease and desist from an unlawful discriminatory practice or to take affirmative action resides or transacts business.

(B) Such proceedings shall be initiated by the filing of a petition in court as provided in division (A) of this section and the service of a copy of the said petition upon the commission and upon all parties who appeared before the commission. Thereupon the commission shall file with the court a transcript of the record upon the hearing before it. The transcript shall include all proceedings in the case, including all evidence and proffers of evidence. The court shall thereupon have jurisdiction of the proceeding and of the questions determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper and to make and enter, upon the record and such

additional evidence as the court has admitted, an order enforcing, modifying and enforcing as so modified, or setting aside in whole or in part, the order of the commission. The court shall require the posting of a sufficient bond before granting temporary relief or a restraining order in a case involving a violation of division (H) of section 4112.02 of the Revised Code.

(C) An objection that has not been urged before the commission shall not be considered by the court, unless the failure or neglect to urge such objection is excused because of extraordinary circumstances.

(D) The court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the commission.

(E) The findings of the commission as to the facts shall be conclusive if supported by reliable, probative, and substantial evidence on the record and such additional evidence as the court has admitted considered as a whole.

(F) The jurisdiction of the court shall be exclusive and its judgment and order shall be final subject to appellate review. Violation of the court's order shall be punishable as contempt.

(G) The commission's copy of the testimony shall be available at all reasonable times to all parties without cost for examination and for the purposes of judicial review of the order of the commission. The petition shall be heard on the transcript of the record without requirement of printing.

(H) If no proceeding to obtain judicial review is instituted by a complainant, or respondent within thirty days from the service of order of the commission pursuant to this section, the commission may obtain a decree of the court for the enforcement of such order upon showing that respondent is subject to the commission's jurisdiction and resides or transacts business within the county in which the petition for enforcement is brought.

(I) All suits brought under this section shall be heard and determined as expeditiously as possible.

OHIO RULES OF CIVIL PROCEDURE

Civ. R. 3

Commencement of Action; Venue

(A) Commencement.

A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant, or upon an incorrectly named defendant whose name is later corrected pursuant to Rule 15(C), or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Rule 15(D).

(B) Venue: where proper.

Any action may be venued, commenced and decided in any court in any county. When applied to county and municipal courts "county" as used in this rule shall be construed where appropriate, as the territorial limits of those courts. Proper venue lies in any one or more of the following counties:

- (1) The county in which the defendant resides;
- (2) The county in which the defendant has his principal place of business;
- (3) A county in which the defendant conducted activity which gave rise to the claim for relief;
- (4) A county in which a public officer maintains his principal office if suit is brought against him in his official capacity;
- (5) A county in which the property, or any part thereof, is situated if the subject of the action is real property or tangible personal property;
- (6) The county in which all or a part of the claim for relief arose; or, if the claim for relief arose upon a river, or other watercourse, or a road, which is the boundary of

the state, or of two or more counties, in any county bordering on such river, watercourse, or road, and opposite to the place where the claim for relief arose;

(7) In actions described in Rule 4.3 (out-of-state service) in the county where plaintiff resides;

(8) In an action against an executor, administrator, guardian, or trustee, in the county in which he was appointed;

(9) In actions for divorce, annulment or for alimony in the county in which the plaintiff is and has been a resident for at least ninety days immediately preceding the filing of the complaint;

(10) If there is no available forum in subsections (1) through (9) of this subdivision, in the county in which plaintiff resides; has his principal place of business or regularly and systematically conducts business activity;

(11) If there is no available forum in subsections (1) through (10) of this subdivision:

(a) In a county in which defendant has property or debts owing to him subject to attachment or garnishment;

(b) In a county in which defendant has appointed an agent to receive service of process or wherein such agent has been appointed by operation of law.

(C) Change of venue.

(1) When an action has been commenced in a county other than stated to be proper in subdivision (B) of this rule, upon timely assertion of the defense of improper venue as provided in Rule 12, the court shall transfer the action to a county stated to be proper in subdivision (B) of this rule.

(2) When an action is transferred to a county which is proper, the court may assess costs, including reasonable attorney fees, to the time of transfer against the party who commenced the action in a county other than stated to be proper in subdivision (B) of this rule.

(3) Before entering a default judgment in an action in which the defendant has not appeared, the court may, if it finds that the action has been commenced in a county other than stated to be proper in subdivision (B) of this rule, transfer the action to a county which is proper. The clerk of the court to which the action is transferred shall notify the defendant of the transfer, stating in the notice that the defendant shall have twenty-eight days from the receipt of the notice to answer in the transferred action.

(4) Upon motion of any party or upon its own motion the court may transfer any action to an adjoining county within this state when it appears that a fair and impartial trial cannot be had in the county in which the suit is pending.

(D) Venue: no proper forum in Ohio.

When a court, upon motion of any party or upon its own motion, determines: (1) that the county in which the action is brought is not a proper forum; (2) that there is no other proper forum for trial within this state; and (3) that there exists a proper forum for trial in another jurisdiction outside this state, the court shall stay the action upon condition that all defendants consent to the jurisdiction, waive venue, and agree that the date of commencement of the action in Ohio shall be the date of commencement for the application of the statute of limitations to the action in that forum in another jurisdiction which the court deems to be the proper

forum. If all defendants agree to the conditions, the court shall not dismiss the action, but the action shall be stayed until the court receives notice by affidavit that plaintiff has recommenced the action in the out-of-state forum within sixty days after the effective date of the order staying the original action. If the plaintiff fails to recommence the action in the out-of-state forum within the sixty day period, the court shall dismiss the action without prejudice. If all defendants do not agree to or comply with the conditions, the court shall hear the action.

If the court determines that a proper forum does not exist in another jurisdiction, it shall hear the action.

* * * * *

Civ. R. 4

Process: summons

(A) Summons: issuance.

Upon the filing of the complaint the clerk shall forthwith issue a summons for service upon each defendant listed in the caption. Upon request of the plaintiff separate or additional summons shall issue at any time against any defendant.

(B) Summons: form; copy of complaint.

The summons shall be signed by the clerk, contain the name and address of the court and the names and addresses of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the times within which these rules or any statutory provision require the defendant to appear and defend, and shall

notify him that in case of his failure to do so, judgment by default will be rendered against him for the relief demanded in the complaint. Where there are multiple plaintiffs or multiple defendants, or both, the summons may contain, in lieu of the names and addresses of all parties, the name of the first party on each side and the name and address of the party to be served.

A copy of the complaint shall be attached to each summons. The plaintiff shall furnish the clerk with sufficient copies.

(C) Summons: plaintiff and defendant defined.

For the purpose of issuance and service of summons "plaintiff" shall include any party seeking the issuance and service of summons, and "defendant" shall include any party upon whom service of summons is sought.

(D) Waiver of service of summons.

Service of summons may be waived in writing by any person entitled thereto under Rule 4.2 who is at least eighteen years of age and not under disability.

(E) Summons: Time limit for service.

If a service of the summons and complaint is not made upon a defendant within six months after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This division shall not apply to out-of-state service pursuant to Rule 4.3 or to service in a foreign country pursuant to Rule 4.5.

Adopted eff. 7-1-70; amended eff. 7-1-71, 7-1-73
7-1-75, 7-1-84.

**CONSTITUTIONAL PROVISION CONFERRING
RULE MAKING POWER UPON THE
SUPREME COURT OF OHIO**

Section 5(B) of Article IV of the Ohio Constitution reads as follows:

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.